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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RELEVANT DOCKET ENTRIES

DATE *1971*		
April	6	Information filed.
April	6	Request by U.S. Atty. for summons.
April	6	Summons issued.
April	12	Praecipe for appearance for deft. by Harold Gondelman, Esq.
April	16	Summons ret. exec. by certified mail.
May	13	ARRAIGNED—plead NOT GUILTY before Teitelbaum, J. (rep. Lilienthal).
June	22	Jury selected 2:35 to 3:17.
June	23	Jury sworn before Teitelbaum, J. (rep. McCleary (U.S. Atty. Thornburgh (Clerk Otterson.
June	24	Jury trial begun before Teitelbaum, J.
June	24	Stipulation of counsel filed.
June	24	Amendment to information filed by U.S. Atty.
June	25	Jury trial continues before Teitelbaum, J. (deft's oral motion for acquittal—denied).
June	28	Jury trial continues before Teitelbaum, J. (rep. Veronica Mechesney).
June	29	Jury trial continues and concludes before Teitelbaum, J. Memo filed. (rep. Mechesney.) (question of jury attached to memo.)

DATE		
1971		
June	29	Jury return verdict of GUILTY—Verdict sheet filed.
June	30	Order *re* Jury accommodations (Teitelbaum, J.) CC: Marshal.
July	26	Transcript filed *re* jury trial held 6-24-71 before Teitelbaum, J. (Rep. Virginia Bengel.)
July	26	Memorandum Opinion filed denying deft's motion for judgment of acquittal made prior to verdict. (Teitelbaum, J.)
July	30	Sentence is that deft. is directed to pay a fine of $2,500.00 on each of Cts. 1, 2, 3 & 4 for a total fine of $10,000.00 (Teitelbaum, J.). Rep. J. Lilienthal.)
July	30	cc issued.
July	30	Notice mailed.
July	30	Order entered directing that the fine be paid into the Registry of the Court and further directing Clerk of Court to pay one-half of said fine, $5,000.00, to said David George Nixon, John J. Zabodni, and Michael Watts, in shares of $1,666.67 each, and that checks be delivered to Richard L. Thornburgh, U.S. Atty., for final distribution. (Teitelbaum, J.)
July	30	Notice of Appeal filed by deft.
July	30	Copy of Notice of appeal mailed U.S. Court of Appeals; together with form to be used in criminal appeals & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to all counsel of record and Judge Teitelbaum.
Aug.	3	Electronic recording of plea before Teitelbaum, J. (#160 Envelope.) (Rep. Lilienthal.)
Aug.	25	Certified record and exhibits mailed Ct. of Appeals.
1972		
May	30	Opinion and judgment of the U.S. Court of Appeals filed.
July	20	Petition for Rehearing filed.
Aug.	21	Order denying Petition for Rehearing.
Sept.	18	Order granting extension of time for filing a Petition for a Writ of Certiorari.
Oct.	20	Petition for Certiorari filed.
Dec.	18	Certiorari granted.

INFORMATION

(Filed April 6, 1971.)

The United States Attorney charges:

On August 7, 1970 at approximately 2:02 p. m., in the Western District of Pennsylvania, defendant, Pennsylvania Industrial Chemical Corporation, a Pennsylvania Corporation, did unlawfully discharge and deposit, from the shore and from its manufacturing establishment situated along the Monongahela in West Elizabeth, Allegheny County, Pennsylvania, and from a concrete pipe approximately 2 feet in diameter at approximate river mile 23.7 of the Monongahela, left bank, certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, and solids into the Monongahela River, a navigable water of the United States in violation of Title 33, United States Code, Sections 407 and 411.

Second Count

The United States Attorney further charges:

On August 19, 1970 at approximately 3:32 p. m., in the Western District of Pennsylvania, defendant, Pennsylvania Industrial Chemical Corporation, a Pennsylvania Corporation, did unlawfully discharge and deposit, from the shore and from its manufacturing establishment situated along the Monongahela in West Elizabeth, Allengheny County, Pennsylvania, and from a concrete pipe approximately 2 feet in diameter at approximate river mile 23.7 of the Monongahela, left bank, certain refuse matter, to wit, iron, aluminum, and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids into the Monongahela River, a navigable water of the United States in violation of Title 33, United States Code, Sections 407 and 411.

Third Count

The United States Attorney further charges:

On August 7, 1970 at approximately 2:07 p. m., in the Western District of Pennsylvania, defendant, Pennsylvania

Industrial Chemical Corporation, a Pennsylvania Corporation, did unlawfully discharge and deposit, from the shore and from its manufacturing establishment situated along the Monongahela in West Elizabeth, Allegheny County, Pennsylvania, and from an iron pipe approximately 4–6 inches in diameter discharging effluent into a small wooden settling box from which water and refuse matter are discharged at approximate river mile 23.7 of the Monongahela, left bank certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, sulfates and solids into the Monongahela River, a navigable water of the United States in violation of Title 33, United States Code, Sections 407 and 411.

FOURTH COUNT

The United States Attorney further charges:

On August 19, 1970 at approximately 3:39 p. m., in the Western District of Pennsylvania, defendant, Pennsylvania Industrial Chemical Corporation, a Pennsylvania Corporation, did unlawfully discharge and deposit, from the shore and from its manufacturing establishment situated along the Monongahela in West Elizabeth, Allegheny County, Pennsylvania, and from an iron pipe approximately 4–6 inches in diameter discharging effluent into a small wooden settling box from which water and refuse matter are discharged at approximately river mile 23.7 of the Monongahela, left bank certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids into the Monongahela River, a navigable water of the United States in violation of Title 33, United States Code, Sections 407 and 411.

/s/ RICHARD L. THORNBURGH,
United States Attorney.

AMENDMENT TO INFORMATION

(Filed June 24, 1971.)

The United States Attorney hereby amends the information filed herein as follows:

1. In Count One by deleting therefrom ", phosphates, sulphates" in lines 10 and 11.

2. In Count Two by deleting therefrom "manganese" in line 10.

3. In Count Three by deleting therefrom "phosphates" in line 13.

RICHARD L. THORNBURGH,
United States Attorney.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

In the United States District Court for the Western District of Pennsylvania

No. 71–75 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, A CORPORATION, DEFENDANT

Proceedings of Jury Trial in the above-entitled action before the Honorable Hubert I. Teitelbaum and a Jury on June 24, 1971, at Pittsburgh, Pennsylvania.

APPEARANCES

Richard L. Thornburgh, Esq., and *James Seif, Esq.*, United States Post Office and Courthouse, Pittsburgh, Pennsylvania 15219, appearing on behalf of the Plaintiff.

Harold Gondelman, Esq., Baskin, Boreman, Sachs, Gondelman and Craig, 1018 Frick Building, Pittsburgh, Pennsylvania 15219, appearing on behalf of the Defendant.

PRELIMINARY INSTRUCTIONS TO JURY

The COURT. Good morning, ladies and gentlemen.

Ladies and gentlemen of the jury, what I will say to you now is intended as an introduction to the trial of this case. It is not a substitute for the detailed instructions on the law in the evidence which I anticipate giving to you at the close of the case just before you retire to consider the verdict.

This is a criminal case commenced by the United States, whom I will refer to as the Prosecution or as the Government, and it is against the Pennsylvania Industrial Chemical Corporation.

The Government is merely a party to this case. It stands on exactly the same level as any other party, no more and no less. It is captioned United States versus because there is no other way to denominate the Prosecution. You should pay no special significance to the fact that it is the Government who is bringing the case. Like I say, it is like any other party when it appears in Court.

This case was begun by the filing of an Information by the United States Attorney, Mr. Thornburgh.

Now, you should distinctly understand that the Information simply makes charges against the Defendant and is not in any sense evidence or proof of the allegations which it contains.

The Defendant has plead not guilty to the Information. The Government, therefore, has the burden of proving each of the essential elements of the Information beyond a reasonable doubt.

The purpose of a trial in a criminal case is to determine whether or not the Government has met its burden. The Information in this case is in four counts. In count one, the Government charges in the Information itself that on August 7, 1970, at approximately 2:02 p.m., in the Western District of Pennsylvania, the Defendant, Pennsylvania Industrial Chemical Corporation, a Pennsylvania corporation, did ulawfully discharge and deposit from the shore and from its manufacturing establishment situated along the Monongahela in West Elizabeth, Allegheny County, Pennsylvania, and from a concrete pipe approximately two feet in diameter at approximate river mile 23.7 of the Monongahela, left bank, certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids into the Monongahela River, a navigable water of the United States in violation of Title 33, United States Code, Sections 407 and 411.

The second count as to charge, on August 19, 1970, at approximately 3:32 p.m., in the same place, the same Defendant did the same thing in connection with certain refuse matter, to wit, iron, aluminum, manganese and compounds containing these chemicals and chlorides, phosphates, sulfates and solids into the same Monongahela River. That is the second count.

The third count refers also to August 7, 1970 at approximately 2:07 p.m., and it charges that the same Defendant did unlawfully discharge and deposit from the shore into the same

Monongahela River in West Elizabeth, Allegheny County, Pennsylvania, from an iron pipe approximately four to six inches in diameter certain effluent into a small wooden settling box from which water and refuse matter are discharged at approximate river mile 28.7 of the Monongahela River, left bank, and that certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids, was deposited into the Monongahela River which again was the same navigable water in violation of the same sections.

The fourth count refers to August 19, 1970, at 3:39 p.m. It makes much the same allegation as the third count except for the difference in the date and the difference in the alleged refuse matter deposited. In this case it was iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulfates and solids into the Monongahela River, a navigable water of the United States.

Those are the four charges. They all concern depositing of certain refuse into the water contrary to law. Those are the allegations.

Now, the sections of the United States Code that are involved are Section 407, Title 33. This section provides in its pertinent part that it shall not be lawful to discharge or deposit from manufacturing establishments any refuse matter of any kind or description whatever other than that flowing from the streets and sewers and passing therefrom into any navigable or in any tributary navigable water from which the same shall float on or be washed into such providing, however, that this section shall not apply to operations in connection with improvement or the construction of public works considered necessary and proper by the United States officers supervising such improvement on public works and provided further that this section shall not be violated if the Secretary of the Army had the above-mentioned in navigable waters unless any grant is violated.

Section 411 of Title 33 provides in pertinent part that every person, every corporation, that violates Section 407 shall be guilty on offense against the United States.

Those are the statutes that we are concerned with. The elements of the offense are as follows. These are the elements that the Government must prove beyond a reasonable doubt: One, that the Defendant discharged and deposited from its manufacturing establishment any refuse matter of any kind or descrip-

tion; two, that it was discharged and deposited into any navigable water or any tributary of any navigable water from which it shall float or wash into any navigable water; and, three, that the refuse matter flowing is not from streets and sewers.

I will go further into these elements, including definition of terms, as it becomes necessary in my final charge, but I wanted you to know that there are three elements that did have to be proved.

As to the second element, the parties hereto have stipulated that the Monongahela River at the sites of discharges and deposits alleged is a navigable water of the United States and also that the shore and manufacturing establishment and concrete and iron pipes alleged to be the sources of the discharge and deposits are owned by the Defendant. So, nobody has to prove those two things. Thus, the second element that I referred to is agreed and stipulated to and no proof will be offered of that. That will mean, however, that the Prosecution will have to convince you beyond a reasonable doubt that this Defendant discharged and deposited from its manufacturing establishment refuse matter of any kind or description. That will have to be proved, and they will have to prove, if there was any such refuse matter, it was not flowing from streets or sewers in liquid state.

I don't know whether you ladies and gentlemen have tried criminal cases prior to this. For that reason, I want to tell you something about the procedure that we are going to follow in this case.

After I finish these preliminary instructions, the case will start with the U.S. attorney telling you what he expects to prove. This is not an argument because you haven't heard any evidence. Nobody is going to argue anything to you. All this is in effect is a road map telling you where he is going, what he expects to prove so, as you hear the testimony from the stand, you will be able to see where it fits into the picture.

I caution you that this opening statement is not evidence. It is not proof of anything. It is merely a statement by the Government, the Prosecutor, as to what he intends to prove. After he does that, he will call his witnesses and introduce evidence in support of the indictments, evidence by which he intends to convince you that the offense was committed.

After the Government has presented its evidence, the defense counsel may, but not need to, make an opening statement. The Prosecution doesn't have to either. The defense can waive an

opening statement. That opening statement is exactly in the same nature as the one by the Prosecution. After making an opening statement, the Defendant can, but need not to, produce evidence. He has a perfect right to rely on the fact that he can contend that the Government failed to meet its burden of proof.

If that is true and you are satisfied as of that, that is the end of the case. It would result in acquittal. He does not have to produce any kind of evidence, but he may do so; and, if he produces evidence, he will call witnesses and introduce his exhibits.

After both have produced their evidence and have rested, the prosecutor then will make his closing argument to you. At that time he will tell you what he contends he has proved and what inferences he thinks you should draw from that proof.

After he concludes, the defense counsel has his opportunity to make a closing comment. Again, neither argument is evidence. The evidence is what you hear on the stand and the exhibits you get. Incidentally, anything I say isn't evidence. The only evidence is what witnesses testify from the stand to.

After the prosecutor has made his closing, the Defendant counsel will make his closing. If there is any appropriate rebuttal, the prosecutor will make it. After that is done, I will give you final instructions on applicable law, and you will retire to consider your verdict which you know must be unanimous and considered separately as to each count.

Under our system, it is your job to determine the facts. Any comment I make you are absolutely at liberty to disregard it. I caution you that, if I do make a mistake in any ruling I make, we have competent counsel here and they have adequate remedies to correct that. If you make a mistake in determining the facts by using any rule of law other than what I have given to you or any evidence other than that which you hear from the stand or any other basis, that would be quite difficult to correct. So you must do your duty conscientiously. Listen to the evidence so you will be able to pass on it at the appropriate time and determine whether it is correct or not.

During the course of this trial, counsel may make objections. In fact, it is probably quite probable that they will. I have never seen a case so far that counsel haven't. And I will have to rule on that. You should draw no inference from the fact that counsel makes an objection or from the ruling of the Court. That is the method by which matters in a dispute as evidence are

brought to the attention of the Court for a ruling. The attorney making the objection is merely doing his duty and, of course, if evidence is excluded, then you must not consider it for any purpose whatsoever.

You will also see from time to time side-bar conferences. This is the bar, not the usual type of bar, and we come to the side of it and there we enter into various discussions. You should not try to guess what we are discussing or wonder why we are there. We are not trying to keep things from you. We are attempting to make sure that the evidence which you get is proper evidence. So, if it appears in doubt—for example, you may hear one of the attorneys, after a witness is called, say I want an offer of proof, and we go over here and the attorney calling the witness tells me what he expects to prove. The other counsel can object or not, and we make a ruling there so you will not be bothered by evidence that is not proper.

Now, you must not consider anything in this case except what you hear here in the courtroom during the trial. You should be careful to avoid reports of the case by any media. Those who live in Pittsburgh will have relatively little trouble to avoid reading about it in the newspapers, but people who live elsewhere might. You should not listen to anything from TV and radio about the case, only what you hear in the courtroom, because the reporter who reports it mainly does a good job but sometimes he reports things which are not exactly as they occur.

You will have to judge the believability of the testimony that you hear. In considering that, you take into consideration the appearance, behavior of the witness, any interest he might have in the outcome of the case, any relation he has to any party in the suit, whether he appears to be speaking to you frankly and with candor or not, and all other methods that ordinarily you will use using your good common sense to judge whether somebody is telling you what is correct or not.

Sometimes somebody gives incorrect testimony because he didn't have the opportunity to observe properly or reason correctly. Those are the matters that you will have to decide.

Now, you should not feel that I have any opinion in the case. If I do, it doesn't matter. It isn't relative. It is your opinion that counts as to the fact in this case. If I wanted to, I could comment on the evidence directly. I could tell you what I thought about evidence. I am not going to do that because I

don't want to impinge on your prerogative in determining the facts. You shouldn't attempt to draw any inference from intonation of voice, facial expression or anything else. I intend to express no opinion, and you shouldn't attempt to read one into anything that might happen.

Sometimes it is necessary, because of the zeal which attorneys have for their cause, that the Court has to stop one or the other attorney from what he is doing. You shouldn't draw any inference from that either. This is not intended to prejudice either attorney or his party. All attorneys in the heat of trying a case sometimes go beyond what the impartial observe believes they should do; and in that instance, it is my job to keep it in an even track. I might have to take steps and say for you not to draw any inferences from that.

This is a criminal case. You are not to concern yourself with what the sentence might be. That is my responsibility and mine alone. You are only to determine guilt or innocence and nothing else, and you should not be concerned with anyone else.

As I already told you, please do not discuss the case with anyone, including yourselves, until the case is all over and you have heard the charge of the Court so you can apply the appropriate law to the facts as you find them.

Mr. Thornburgh.

Mr. THORNBURGH. May we approach the bench for a moment?

The COURT. Surely.

[At side bar.]

Mr. THORNBURGH. I am not quite sure that Your Honor stated our burden correctly as saying we have the negative that this came from a sewer in liquid state in view of the stipulation that the pipes in question are owned by the Defendant. It is clear that they are not.

Mr. GONDELMAN. He still has to prove it. Although the pipe is owned——

Mr. THORNBURGH. Are you contending——

Mr. GONDELMAN. Of course, the fact that one pipe is on our property—number one, it's a sewer. Item number two, I would specifically expect, although I realize Your Honor is making opening remarks, the elements of this offense go beyond what Your Honor has indicated to the Jury, mainly that the Government has a burden of proving the intent and slander and knowledge of the Defendant, and I call Your Honor's attention

to the fact that the only Supreme Court case that discusses it says that it does not require it.

The COURT. Yes, as I read it, it says there is no requirement.

Mr. GONDELMAN. In light of the evidence, it is going to be extremely material.

The COURT. That might become material. If so, we will make a final charge.

Mr. THORNBURGH. Do I understand that Your Honor means that we have to show that this is not a sewer?

The COURT. That it isn't—the statute reads that it isn't something coming from the sewers in a liquid state.

Mr. GONDELMAN. So you go ahead and prove it doesn't.

The COURT. The statute has as an element an exception to it.

Mr. THORNBURGH. I understand that but——

The COURT. I feel that whether or not there was a permit is a matter of defense. That is my present feeling, but I feel that this is a matter which requires affirmative proof.

Mr. THORNBURGH. Negative proof is what it amounts to.

The COURT. Affirmative proof or negative, you have the burden of proving it rather than placing that burden on the Defendant.

Mr. THORNBURGH. O.K.

[In open court.]

The COURT. The stipulation of counsel to this matter to which I have referred and the amendment to the information which are to be filed are being filed of record.

OPENING STATEMENT BY MR. THORNBURGH

Mr. THORNBURGH. Ladies and gentlemen, let me first introduce myself to you again. I am Richard L. Thornburgh, the United States Attorney for Western Pennsylvania. Seated at counsel table with me you will observe James M. Seif who is an Assistant United States Attorney on my staff and who is assisting me in the preparation and trial of the case for the Government.

Judge Teitelbaum has given you a rough outline of the charges that the Government has made and a description of the law under which this case is brought.

I am going to avail myself of the opportunity to sketch for you the facts which the Government will attempt to prove

through the testimony of witnesses, documents, photographs and the like in this case.

I am, as Judge Teitelbaum indicated, trying to give you a preview of the evidence that will be offered as a kind of a road map for you to follow as the case unwinds.

You, in effect, right now are in the position of a person looking at a blank canvas at an art exhibition. You don't really know what the picture is going to be like. During the course of the trial, there will be brush strokes applied on that canvas in the form of evidence by the Government and by the Defendant. And, finally, at the end of the trial, you will have to be in a position of judging just what kind of a picture has been painted and ultimately deciding what that picture is as the finders of fact in this case.

I want to tell you right now, to extend that analogy a little bit, what the Government thinks that picture is going to look like.

As Judge Teitelbaum told you, what I am telling you is not fact and not evidence and something you are free to ignore if I state a fact that we hope to prove and we end up not proving it. I am sure the defense counsel and the Judge will remind you if such is the case.

As Judge Teitelbaum said, the Government charges simply that the Defendant discharged refuse matter from their plant in West Elizabeth in Allegheny County into the Monongahela River in violation of the Rivers and Harbors Act of 1899 that you will hear as the Refuse Act.

The proof of the offense which the Government will offer is not complex. It will consist of testimony of individuals who observed the discharge and gathered samples of that discharge and of the testimony of the chemist to whom they turned these samples over for analysis.

Now, in this case, the persons who investigated the violations are not the ordinary Government witnesses in a criminal case. They are not agents of the FBI or Secret Service, but they are ordinary citizens like yourselves. They are two young instructors, David Nixon and Dr. John Zavodni and a student, Thomas Young, in a local college and Michael Watts, an experienced chemist who works for the Allegheny County Bureau of Tests.

Although these people may potentially, as you hear, gain a share on any fine that may be levied against the Defendant,

they will explain what their real motive may be. The testimony you will hear from them is the following: You will hear how they become interested in taking these samples, what procedure and equipment they used. You will hear the precautions they took to insure the accuracy of their process. You will hear specifically that on the afternoon of August 7, 1970, Mr. Nixon and Dr. Zavodni pulled their canoe in which they were traveling on the river alongside two pipes discharging from the Pennsylvania Industrial manufacturing establishment and took samples of what was being discharged.

We will show you pictures of those pipes and discharge coming out of them. You will hear that Mr. Nixon and Mr. Young returned to these same two pipes on August 19, 1970 and took additional samples in the same way. And you will hear they turned these samples over to the Government's fourth witness, Michael Watts.

He will tell you that he is the director of the Allegheny County Bureau of Tests, and he will sketch for you some of his activities of testing river samples over a period that stretches back to the 1920's. He will describe to you his experiences in making these tests and will describe to you the methods that he uses and they comported with the methods recommended by those experts in the field.

Mr. Watts will tell you, as a director of the Allegheny County Soil and Water Conservation District, he undertook to assist Mr. Nixon and Dr. Zavodni by performing his chemical analysis when they came to him for help. Mr. Watts will describe the tests he carried out, and he will tell you the results of his examination.

He will tell you first the characteristics of the river samples taken at the site of the plant of the Pennsylvania Industrial Chemical Corporation, and he will describe the character of the liquid being discharged from the pipes that these gentlemen pulled their canoe alongside. He will tell you what his tests show in terms of the iron, aluminum, chlorides, phosphates, sulfates and total solid chemicals that were contained in it and which the Government alleges were the refuse giving rise to these charges.

You also have learned by this time that Mr. Nixon and Dr. Zavodni have turned over the results of their samples and the tests run by Mr. Watts to the Government, that is, to my office, United States Attorney's office for the Western District

of Pennsylvania, and that these charges being tried here today were the final results of their undertaking, their labors.

That is it, ladies and gentlemen of the Jury. That is what the Government hopes to prove. I promised you it would be simple and not complex, and I think that we are now ready to proceed to follow the course that I have outlined to you.

I realize that some of the testimony that we will receive will be somewhat technical in nature, and I solicit your patience and particular attention to some of the technical questions. I will try to elicit from the witnesses, as I am a layman myself, a clear understanding of it, and I must give you that one storm warning with respect to some of the testimony that will be received.

Thank you, Your Honor.

The Government calls David Nixon.

OFFER OF PROOF

Mr. GONDELMAN. If the Court please, I would like an offer at side bar on this witness in light of the opening statement.

The COURT. Ladies and gentlemen of the Jury, you will observe counsel has asked for an offer of proof, and you remember I told you what we are going to do up here. I am going to ask him what he expects to prove, and we will pass on it prior to the time that it is brought to your attention.

You will also note that everything that is being said in the courtroom is being taken down by a stenotype reporter here. So, if there are any mistakes made, they can be corrected.

[At side bar.]

Mr. THORNBURGH. Mr. Nixon's testimony is offered to show the existence of a discharge at the sites alleged in the Information on August 7 and August 19, and he will describe the techniques used by himself and Dr. Zavodni and Mr. Young in the collection of samples at those sites. That is about it.

Mr. GONDELMAN. Well, in your opening statement, you said he was going to testify as to his motives which I thought might be included in your offer, and his motives should not interest the Court and the Jury, and I thought you might include that in your offer.

Mr. THORNBURGH. I was anticipating a fact. There is a question in this case as to the bounty provisions, and I was going to give Mr. Nixon the opportunity to discuss that.

The COURT. I think that is important because the Jury should know that, whether he is biased or not.

Mr. GONDELMAN. I would disagree with that because his testimony is going to be as to what he physically did and took. If we are going to get a half-hour exposition on environmental control and polluting——

The COURT. That is not what he has in mind.

Mr. THORNBURGH. If you are not going to go into his motives——

Mr. GONDELMAN. I am not going to go into that.

Mr. THORNBURGH. If you won't on cross, I won't on direct.

Mr. GONDELMAN. If you don't go into his motives on direct, I can't go very far on cross.

Mr. THORNBURGH. You can.

Mr. GONDELMAN. The other thing, if the Court please, I would object to any testimony and identification of exhibits of the taking of samples unless at some point it will be tied into proof by the Government that what these reports indicate are quote refuse of any kind unquote.

The COURT. If they don't prove that, you don't have any worries.

Mr. GONDELMAN. On the other hand, I don't want any testimony coming in. I don't want to simply object to the thing. What I am stating now, unless it is entitled to that definite proof to which I consider their burden to be. Whether I will object to that at the time is something to see.

The COURT. There is nothing to rule on.

Mr. GONDELMAN. No.

[In open court.]

[David George Nixon called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. I would appreciate it, Mr. Nixon, if you would address your responses to my questions to the Jury.

Would you state your full name for the record, please?

A. David George Nixon.

Q. Where do you live, Mr. Nixon?

A. 900 Seneca, Apartment 4, McKeesport.

Q. How long have you lived there?

A. Approximately two years.

Q. What is your age, Mr. Nixon?

A. My age is 30.

Q. Were you born in Western Pennsylvania?

A. No, sir, I was not.

Q. Where were you born?

A. I was born in Herington, Kansas, 1940.

Q. And you have lived in the McKeesport area for the last two years?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Do you have children?

A. Two children, a boy and a girl.

Q. Where were you educated, Mr. Nixon?

A. I did my undergraduate work at Colorado College in Colorado Springs.

Q. Did you receive a degree?

A. I did, a Bachelor of Arts degree. My major was political science.

Q. Did you have any post-graduate education?

A. Yes, sir, I did. I went to Johns Hopkins University in Baltimore, Maryland where I spent two years engaged in graduate studies.

Q. Where are you presently employed?

A. Pennsylvania State University, instructor in political science.

Q. Where is that?

A. McKeesport.

Q. Is that the McKeesport extension?

A. It is the McKeesport campus.

Q. How long have you been employed?

A. Two years.

Q. Now, Mr. Nixon, I want to direct your attention to the spring of 1970, about a year ago, and I want you to tell the Court and Jury in your own words how you became involved in the case that is being tried here today.

Mr. GONDELMAN. If the Court please, I object to that question as going back to the spring of 1970. The information charges offenses of August 7, 1970 and August 19, 1970. I think we ought to remain within the confines of the information.

Mr. THORNBURGH. I am merely trying to put it into context,

and I think some preliminary facts might be of help to the Jury and the Court.

The COURT. The objection will be overruled.

By Mr. THORNBURGH:

Q. Did you understand the question?

A. I understood the question. On about April 10 or 15 of last year, I was reading a journal entitled Congressional Quarterly——

Mr. GONDELMAN. If the Court please, we are not going to get into a journal and perhaps what motivated him which isn't evidence but purely heresay. That is the basis of my objection. I don't know what the Journal said or how it motivated him.

Mr. THORNBURGH. Let him testify and——

Mr. GONDELMAN. If I do and evidence comes in which I can't object—he is talking about reading a journal and what it did to motivate him. I object to it.

The COURT. It isn't hearsay certainly because we are not concerned with the truth or falsity of whatever was said in the Journal.

If there is any kind of objection that appears after we have heard what he is going to say, we will consider it then.

The WITNESS. I was reading the Congressional Quarterly at that time, early April of last year, at which time I discovered the existence of the Refuse Act which prohibited a discharge of refuse in the navigable rivers of the United States.

It seemed to me at that time that at last I found a handle by which a citizen could have some meaningful influence on the amount of effluent that was being dumped into the area rivers.

I was encouraged by that and began about three weeks of research in which time I collected Supreme Court and Circuit Court tests of the Refuse Act since it had been passed into law and was encouraged to find that——

Mr. GONDELMAN. If the Court please, we are not going to get a legal conclusion.

Mr. THORNBURGH. Just tell us what you did, not any conclusions.

You are not a lawyer, are you?

The WITNESS. No, sir.

The COURT. Don't summarize the statutes, Mr. Nixon.

The WITNESS. Yes, sir.

By Mr. THORNBURGH:

Q. Let me ask you this: On the basis of the research that you carried out, and not indicating what your conclusions were because we are not interested in that, did you decide on a course of action that you were going to follow?

A. Yes, sir.

Q. What was that course of action?

A. I decided that I would begin a project to document exactly what kind of refuse was being dumped into the Monongahela and Ohio Rivers in the Pittsburgh area.

Q. Did you know at that time whether any refuse was being dumped into the river?

A. In a legal sense, no, sir, I didn't. I simply had observed pipes dumping something into the water.

Q. Did you discuss these plans and this project with anyone at that time?

A. Yes, sir. It was clear to me that the project I had in mind would take efforts of certainly more than one person.

Q. With whom did you discuss it?

A. I went to a fellow faculty member, a biologist at Pennsylvania State University, John Zavodni.

Q. Is he a colleague of yours on the faculty?

A. Yes, sir, he is.

Q. How long did you know Dr. Zavodni?

A. I had known him at that time for approximately seven or eight months.

Q. Did you discuss your plans and your projected course of action with him?

A. Yes. I told him a little bit about the Act that I had discovered and its provisions and asked him if he would be interested in spending the better part of the summer documenting industrial discharges into the Monongahela and Ohio Rivers.

Q. What did he say?

A. He said he thought it would be a good idea and that he would be glad to help.

Q. Now, in the time that you had done this research, you had become familiar with the fact that the provisions of the Refuse Act allow the award of so-called bounty to citizen informants, did you not?

A. Yes, sir.

Q. Did you discuss that with Dr. Zavodni?

A. I did, of course, discuss it with John Zavodni, but I must say I did not tell him about that section of the Act until after

he had agreed to take part in the project and until after he had agreed, as far as that goes, to contribute a hundred dollars with me in a fund that we would finance the project with.

Q. Mr. Nixon, did you and Dr. Zavodni undertake this project as a money-making proposition?

A. No, sir, we did not.

Q. Now, I wonder if you could go into a little more detail as to the specifics of how you planned to carry out this project?

A. Well, most obviously, we would need to acquire some equipment, a canoe or any shallow craft, vessel. In our case, it was a canoe, paddles, life preservers. We needed containers in which to collect samples of effluent. We needed and eventually were able to get a small motor for the canoe and various incidentals and miscellaneous equipment such as thermometers.

Q. But in the spring of 1970, you were making inventory of your needs and they included a boat, paddles, life preservers and, did you say containers?

A. Yes, sir.

Q. Why did you need the boat?

A. Well, it is impossible to get to many of these discharges, industrial discharges, since the mills or companies in question control access to the river banks. So, you need to get to them on the water, and we did not have the boat.

Q. Did you get a boat?

A. Yes, sir, we were able to purchase a secondhand, 15-foot aluminum canoe.

Q. Who paid for that?

A. John Zavodni and I paid for that.

Q. Had either of you done any canoeing up to that time?

A. No, sir. I had never been in a canoe in my life.

Q. You bought the paddles?

A. Yes.

Q. Who paid for those?

A. We both paid for all the equipment.

Q. You bought the life preservers and the containers?

A. Yes.

Q. What kind of containers did you get?

A. Six-ounce plastic bags. We bought that with sterile containers.

Q. On whose advice did you get this?

A. John and I were simply looking for some expeditious way to take these samples, and we wanted sterile containers and

something that could handle it, and it seemed like a good idea at the time.

Q. With the canoe, the paddles, the life preservers and the containers, would you describe what the course of action was that you planned to follow with this equipment and paraphernalia?

Mr. GONDELMAN. That goes beyond the scope of the indictment because we are in the spring of 1970. What course of action he intended——

The COURT. Let's hear it first. I don't know what it is.

By Mr. THORNBURGH:

Q. Go ahead.

A. First we had to learn how to use the canoe, and we took a couple of practice or several practice runs really to learn how to handle it so we wouldn't spill our equipment in the water. We went on, as I say, several such trips down the Youghiogheny River, once down Turtle Creek and one trip by myself on the Monongahela River, and we then finally collected our first samples on May 28 of last year.

Mr. GONDELMAN. That is objected to as not referring to this indictment.

The COURT. We haven't heard what was in them. I think it would be admissible anyway, but we won't go into it anyway.

By Mr. THORNBURGH:

Q. Let me get more specific. What I am asking you, without reference to any particular sample that you took, is what the procedure was that you and Dr. Zavodni appeared to follow as a general rule of taking samples without reference to any particular sample?

A. We decided that one person would collect all of the samples.

Q. Who was that?

A. That was John Zavodni. The other person would keep records and handle the camera.

The reason for this was simply that the sample collection is a regular, dirty business and somebody had to keep clean, and fortunately that was me.

Q. You were Mr. Clean then in the canoe?

A. Yes. We decided then simply to find out what was in the river since at that time we did not know.

Q. Wait. Let me explain again what I want. I want to know what your plan was physically with respect to your location and

the manual chores that you and Dr. Zavodni went through. Do you understand my question?

The COURT. You designated him as Mr. Clean.

By Mr. THORNBURGH:

Q. We got him taking the records.

What I would like is a kind of a job description of each of you on a typical collection operation. I'm sorry I didn't make that clear.

A. John would simply be in the bow of the canoe. I would be in the stern. We would bring the bow of the canoe as close a proximity to the effluent being discharged as possible.

John would then collect the sample either directly into a sample bottle or the plastic container, and at that time I would give him a code number to write on that sample, which he would do.

And I, in the meantime, would be taking down the date, the time, any obvious physical characteristics of what we were seeing, the location of the discharge, what side of the river it was on, at what approximate mile point, and we were able to determine this by reference to the Corps of Engineers Navigation Charts.

Mr. GONDELMAN. Excuse me, Mr. Thornburgh, but, if what we are trying to prove, if I understand Mr. Thornburgh's questions, is whether or not the samples which are alleged to have been taken on these dates at these times came from near or about the Defendant's plant along the Monongahela River, there is not going to be any contest about that.

The COURT. You are indicating you will stipulate to it, but whether Mr. Thornburgh wants to stipulate or wants to prove it is up to him.

Mr. GONDELMAN. I would agree that the samples from the reports of what I have came from the area that came from—

Mr. THORNBURGH. I think it's important for the Jury to have an understanding.

The COURT. This is an offer to stipulate; and, if you want to prove it without a stipulation, go ahead.

Mr. THORNBURGH. This is offered to show the practice, and we will get to the specifics as quickly as we can. We will be very brief.

The COURT. The Jury and I have lots of time. Just go right ahead.

By Mr. THORNBURGH:

Q. Let me rephrase my question, Mr. Nixon.

Let's take a typical situation where we are collecting a sample. You give me the steps you would go through, you and Dr. Zavodni.

Mr. GONDELMAN. I would object to the typical situation. Why don't we get to August 7 and 19, because I object to what a typical procedure was if it then isn't followed up with what was done. If we get to what was done, we don't need the typical.

The COURT. We will have to let the Government counsel try the case in his manner, Mr. Gondelman.

Mr. GONDELMAN. Except as what is irrelevant to what is generally done, which is irrelevant, and I object to that. What was done on August 7 and 19 is the question. I object to the general typical and what did you usually do, how did you usually do it, until we get to the point of what was actually done.

The COURT. If it isn't tied in, you can move to strike.

Go ahead, proceed.

The WITNESS. We would pull the canoe up to the bank as close a proximity to the discharge as possible. John would get a sample bottle; and, if he could reach a discharge from the canoe——

By Mr. THORNBURGH:

Q. A sample bottle?

A. Well, later on in the study we began to use glass bottles rather than the plastic bags which I referred to earlier.

He would take either a plastic bag or a quart sample bottle and, if he could reach the effluent discharge from the canoe, he would at that time insert a funnel into the top of the bottle and hold that under the discharge and then rinse the funnel out in the discharge water and the bottle out in the discharge water, and then he would fill the bottle with the effluent that was coming out of whatever source it might have been.

He would then place a cap on the top of the bottle. At that time I would give him a code number to write on the sample bottle for future identification.

Q. Would he write that on there?

A. Yes, he would write it on the bottle with the Magic Marker pencil.

Q. On the glass?

A. Sometimes on the glass, but we had bottles prelabeled in many cases, and he would write it on the label of the bottle. I would then record the date, time and location and so forth.

Q. How would you record that?

A. We had a piece of paper which indicated what kind of relevant information we would have to collect, and I would take that information down. In addition, I would take photographs, a close-up picture of the nature of the discharge, and then, after sampling, back away from the discharge usually and take a distant shot to facilitate future identification at the location of the discharge.

Q. How did you decide which discharges you were going to sample?

Mr. GONDELMAN. Objected to as immaterial.

The COURT. Overruled.

The WITNESS. We really made no prior judgments. We simply looked for pipes dumping stuff into the water. When we came across such a pipe, we would sample it.

By Mr. THORNBURGH.

Q. How did you plan to identify the data which you collected?

A. Again, by code number. We would assign a number to any pipe that we would find dumping effluent.

Q. Did you have a system for identifying those numbers?

A. We did. We had a number series. For example, the 200 series represented—and any code number that was 209 and something would be taken above lock and dam number three on the Monongahela River.

The 110 series would be between that lock and dam all the way down to the Youghiogheny or past the Youghiogheny River to the lock and dam number two on the Monongahela near the Edgar Thompson Works of U. S. Steel.

And the 300 series began at that point and went down the Monongahela to the confluents of the Monongahela to the Allegheny or the beginning of the Ohio River.

And the 400 series began at that point and went on down the Ohio River to roughly Aliquippa.

So, if a number or a sample has a code number of, say, 400 and something, that means it comes from a certain location on the river.

The COURT. Ladies and gentlemen of the Jury, from this testimony an inference could be drawn that tests were made from pipes having no connection with this Defendant. You must not speculate as to what the results were of any tests except as to those set forth in the information here concerned.

By Mr. THORNBURGH:

Q. How would you identify a particular sample that you took, using this code that you have set up?

Mr. GONDELMAN. If the Court please, I again state we are still talking about how would you. We have four samples specifically relating to this case. It seems to me we ought to get to those so we don't get to the objection Your Honor himself raised.

The COURT. I didn't raise any objection. I am merely saying what the Jury is hearing is the background, history, of the general operation, and we will be concerned with how that applied to the four situations set forth in the Information.

Ladies and gentlemen of the Jury, this is for background purposes so you will understand what happened. We can't try cases in a vacuum. Anything other than the four things in the Information, you shouldn't concern yourself as to what happened except as to the four.

I am just merely trying to instruct the Jury as to how to treat the evidence.

By Mr. THORNBURGH:

Q. Do you recall the question, Mr. Nixon?

A. Yes, sir. As I stated, each pipe was assigned a number. Let us say 100. The first sample we would collect from that pipe would be labeled 100–1. The second sample, 100–2 and so on.

Q. So that, by looking at a sample and collating it with your data that you were taking in the back of the canoe, could you identify where that particular sample had come from?

A. Yes, I could pin down the exact geographic location.

Q. Could you identify the date and time upon which it was taken?

A. Yes, sir.

Q. How many samples would you take at each outfall?

Mr. GONDELMAN. Objected to as immaterial.

The COURT. Overruled.

The WITNESS. As a rule of thumb, we attempted to take multiple samples of every discharge. The average over the entire summer was three to four samples of every discharge that we observed.

By Mr. THORNBURGH:

Q. You stated that you would—well, you tell me and tell the ladies and gentlemen of the Jury precisely what data you

would take at the end of the boat as was observed by you or passed on to you by Mr. Zavodni.

A. Yes, we would take down, again and most basically, the code number. We would then write the location, the physical location, of this discharge pipe on the river. We would specify what part of the river, right or left bank, as determined when you are facing downstream, right or left bank. I would write down a description of the discharge facilities, was it a pipe or a tunnel of approximately what measurements, what was the material of which it was made, iron pipe or concrete pipe and so on.

I would, in addition, write down the date of the sample and initial—and get the initials of anyone who witnessed it. Usually that was John and I. And, again, I would inscribe the date and then the time, the sample number, indicating the method by which we took the sample.

In some cases, as I have indicated, the discharge was very easy to reach. In that case, we would sample it at its source before it touched anything else. In other cases, it was impossible to do that and we had to sample the effluent after it had run down the bank but before it entered the river. In such a case, I would enter it "before entry" and the date. There would be a space to indicate who took the sample. There would be the place where John Zavodni would sign his name, and finally there would be an indication whether or not any photography had been done at that site.

Q. When you had collected these samples, did Mr. Zavodni analyze them then?

A. No, he did not although it was originally planned to do that. It just became clear to us in the first place that we were generating many more samples than John had either the time or the equipment to analyze. There was just too much of a project.

Q. Who did analyze them?

A. Mike Watts, the Director of the Allegheny County Bureau of Tests.

Q. How did this come about?

A. After it became apparent to us that we couldn't possibly analyze the samples ourself. In the first place, I don't have the expertise. I don't have the training to help John, so he would have had to do it on his own.

When it became apparent we couldn't do our own analysis, I began looking for help.

I called a man named Wayne Kelly who is the executive assistant of Commissioner Thomas Foerster.

Mr. GONDELMAN. If the Court please, I would object to what Commissioner Foerster's man told him. He hired Mike Watts. That is what we are eventually going to get to, but the telephone call, you call it background material; I call it a waste of time.

The COURT. That will be for the Jury to determine.

You may proceed.

Mr. GONDELMAN. I object to something anybody told him.

The COURT. I haven't heard anything like that so far.

Mr. GONDELMAN. When a telephone call was made, I don't know whether he is testifying as to hearsay or not, and I don't know whether or not he knows what hearsay is.

The COURT. There is a time-honored procedure in every Court that, if the testimony is hearsay, you move to have it stricken and then we ask the Jury to disregard it.

Mr. GONDELMAN. Also, Your Honor, I try in all cases to anticipate hearsay so it doesn't come out in Court so Your Honor does not have to instruct the Jury to disregard something they heard.

The COURT. We will see where we are going.

By Mr. THORNBURGH:

Q. Leave out the telephone conversations, Mr. Nixon. Just tell with whose cooperation you were able to get Mr. Watts' assistance.

Mr. GONDELMAN. Objected to as immaterial.

The COURT. Whom did you talk to concerning somebody to test this material?

The WITNESS. I talked to a man named Wayne Kelly.

The COURT. As a result of that, what did you do?

The WITNESS. I asked him if the county would analyze our samples since we had really no way of doing it and we couldn't afford to hire it done.

The COURT. Who did you ask that?

The WITNESS. I asked Mr. Kelly that question and asked him to request Commissioner Foerster to grant us permission to have Mike Watts analyze those samples.

That permission was later forthcoming, and Mike Watts then began about mid-July to do all of our chemical analyses.

By Mr. THORNBURGH:

Q. You then delivered in mid-July the first set of plastic bags that you had taken samples of?

Mr. GONDELMAN. Objected to as incompetent, irrelevant and immaterial as to the information which is August 7 and August 19. What he delivered in July has no bearing on this case.

Mr. THORNBURGH. May we approach the bench for just a moment?

[At side bar.]

Mr. THORNBURGH. It is evident that these fellows didn't just show up out of a clear blue sky on August 7, and I object to Mr. Gondelman's continuing objection to an objection that is overruled and interrupting a line of——

The COURT. I think, too, you can't do this. You have to have background; and, if you didn't do it this way, you would be fuming when he would attempt to introduce——

Mr. GONDELMAN. No, because it is highly prejudicial, totally immaterial, highly irrelevant because the fact is that all this guy has to testify to is that he took a sample on August 7, sent it to the county lab. Everything that is being testified to, you can instruct the Jury from now to doomsday that they are not to consider it and——

Mr. THORNBURGH. There is a matter of how careful he was, whose advice he sought. I can't just——

The COURT. I am not going to tell Mr. Thornburgh how to try his case. The next time you prosecute a case, you can do it your way.

Mr. GONDELMAN. My objections will be on the record so we understand?

The COURT. You have a continuing objection to the background information; and, if I am wrong, there are people that can correct it.

Mr. GONDELMAN. O.K., fine, thank you, very good.

[In open court.]

By Mr. THORNBURGH:

Q. In mid-July then, did you deliver the first of these plastic—was it plastic bags? You spoke first about plastic bags; then you spoke of quart bottles. Will you explain what the differential was?

A. The plastic bags were of a six-ounce capacity. After initial contact with Mr. Watts, we learned that six ounces or even

twelve ounces, that is one or even two bags, of effluent would not be sufficient to run a complete chemical analysis.

The COURT. That's getting into hearsay now. I think what we better do is merely say what you did.

The WITNESS. We changed from—we discontinued the use of six-ounce plastic bottles and began using twelve-ounce or one-quart glass bottles.

By Mr. THORNBURGH:

Q. Where did you get those bottles?

A. Those bottles were provided to us by Mr. Watts.

Q. When you talked to Mr. Watts and obtained his assistance, did you tell him what you were doing?

A. Yes, sir.

Q. What did you tell him?

A. We told him simply that we were making an inventory of all the industrial discharges that we could find on the Allegheny and Ohio Rivers.

Q. When you would deliver a set of samples to Mr. Watts in the bottles, how would they be described?

A. I am sorry, we would not deliver the samples as such. Mr. Watts would dispatch an Allegheny County car to come out to the campus at Penn State and pick those bottles up where they had been stored under lock and key. We would then load them into his automobile, and he would take them to Mr. Watts.

Q. How did you identify them to Mr. Watts?

A. By the code number.

Q. Did you tell him where any particular one came from?

A. We did not.

Q. Did you get from Mr. Watts the results of his tests that he performed?

A. Yes, sir.

Q. How were they furnished to you?

A. They came essentially in four bundles, one bundle of data, several pages of data, rather early in the game. Then there was a period of time that passed while he was occupied with doing the analysis. When he had his data in a relatively finished form, he began sending us then three other packets of data.

Q. You eventually got the results of all the tests made on the bottles that you furnished?

A. Yes, sir.

Q. Now, Mr. Nixon, I would like to direct your attention specifically to August 7, 1970. Can you now tell the Court and the Jury precisely with respect to the matters alleged in the information relating to August 7, 1970, what you did on that date?

The COURT. This seems to be an ideal breaking point for a morning recess. We will recess the Court for ten minutes.

(A recess was taken at 11:10 a.m., after which at 11:40 a.m., the following proceedings were held in Open Court:)

The COURT: Can we have the witness back on the stand?

Mr. THORNBURGH. Mr. Nixon.

The COURT. Proceed, sir.

By Mr. THORNBURGH:

Q. We had arrived at the recess, Mr. Nixon, at August 7, 1970, and I directed your attention to that date and asked that you describe to the Jury and the Court the activities which you undertook that day as they bear on the issue before the Court at this time.

A. May I refer to my notes, please?

Q. Yes.

A. On the 7th of August at approximately 2:02 p.m., John Zavodni and I paddled up to the Pennsylvania Industrial Chemical Company or the discharge at that time that we labeled as No. 230.

John Zavodni used a sampling device. It is a bamboo pole with a sampling device at the end of it, container at the end of it, and he sampled effluent that was coming out of a two-foot concrete pipe that was dumping effluent into a small wooden settling box. The effluent was then running out of the settling box down over the rocks on the bank into the river.

Q. What number discharge is this?

A. No. 230.

Q. Go ahead.

A. John used the sampling device which I have described on the end of the bamboo pole and inserted that into the effluent collecting the sample after he had rinsed out as per our usual practice. He then stoppered the bottle after he had poured the effluent into the sampling bottle. I gave him the code number, in this case, Code No. 230-1.

Q. The No. 230 indicated what?

A. The No. 230 indicates that two-foot concrete pipe at approximately 23.7 miles on the Monongahela, on the left bank

of the Monongahela River, just downstream of the lock and dam No. 3.

Q. What did the dash one means?

A. The dash one means it was the first time that we sampled that particular discharge of effluent.

Q. Now, you mentioned that this was Pennsylvania Industrial Chemical Corporation. Did you know at that time that this was Pennsylvania Industrial Chemical Corporation?

A. We had inquired at the lock and dam as to the identity of the mill. The lock is directly across the river and just slightly upstream from the mill in question. We were led to believe that that was the name of the company.

The COURT. Ladies and Gentlemen of the Jury, I caution you that that is how he got the information, but that does not establish that that is who owns the pipe. I believe, however, that that has been stipulated.

Mr. GONDELMAN. It is stipulated to. It is on our property.

The COURT. It is the pipe coming from the Defendant Corporation.

By Mr. THORNBURGH

Q. This was not the only site at which you were sampling on at that time?

A. No, sir. After sampling No. 230——

Q. Let me interrupt you there, Mr. Nixon.

Mr. GONDELMAN. May I see those, please, so I can identify mine.

(Whereupon, Government Exhibits Nos. 1, 2, 3 and 4 were marked for identification.)

My Mr. THORNBURGH:

Mr. Nixon, I show you what has been marked for identification purposes Government Exhibit Nos. 1, 2, 3 and 4 and ask if you can identify those? Take them in order, first Government Exhibit No. 1.

A. Number one is or contains a picture of discharge which we had labeled 230.

On the back of the photograph it has in my handwriting the number of the discharge.

Q. What is on the back?

A. 230.

Q. Who took that picture?

A. I took the picture and developed the film from which this print was made.

Q. Would you indicate on that picture, Government Exhibit No. 1, the location of what you have described as Outfall 230? Circle it.

A. Certainly.

Q. And that is what you have described as the concrete pipe discharging into a wooden settling box?

A. Yes, sir.

Q. When was that picture taken?

A. That picture was taken on August 7.

The COURT. The year?

The WITNESS. August 7 of 1970, excuse me.

By Mr. THORNBURGH:

Q. Would you similarly identify Government Exhibit No. 2?

A. Government Exhibit No. 2 shows the same discharge, this time from a closer vantage point. Again, it has in my handwriting on the back 230, our identifying code number.

Q. By whom was that picture taken?

A. By myself.

Q. You took all these pictures on the day in question, didn't you?

A. Yes, sir.

Q. Would you similarly identify No. 3 then?

A. This is yet another picture of the same discharge taken by me. Again it has in my handwriting on the back No. 230. Again it is a close-up of the same discharge.

Q. And No. 4?

A. No. 4 is a color photograph of the same discharge showing the wooden settling box, the pipe, the effluent pouring down over the rocks into the river.

Q. And on the reverse side it has No. 230?

A. No. 230.

Mr. THORNBURGH. I would like to move into evidence the Government exhibits and ask the Court leave to give them to the Jury to examine.

Mr. GONDELMAN. If the Court please, I object to the exhibits for the reason that unless the Government will tie it into not being one of the exceptions, and I think it ought to be done prior to their admission, that it will have no relevancy in this case.

The COURT. Objection is overruled. The jury will have the opportunity to see the pictures at the recess.

Mr. THORNBURGH. All right.

(Whereupon, Government Exhibit Nos. 1, 2, 3, and 4 were received in evidence.)

By Mr. THORNBURGH:

Q. Now, on August 7, 1970, after Mr. Zavodni had completed the sampling of what you identified as No. 230, what steps did you follow next?

A. After having sampled No. 230, after having photographed it, then we paddled downstream some 100 feet to a second discharge which we have identified as No. 231.

That discharge again is about at 23.7 miles on the Monongahela, again on the left bank. It is a four to six inch iron pipe again discharging effluent into a small wooden settling box. The effluent was pouring out of the settling box onto the rocky bank and then into the river.

We paddled up to that site and John, again using the bamboo pole with the sampling device on the end, collected the sample and again by the standard procedure transferred it into a sample bottle by using a funnel. He then capped the bottle. I gave him the code No. 230–1 which he wrote on the bottle.

After I inscribed the date and time in our notes, I took photographs of that discharge.

Mr. THORNBURGH. Would you mark these, please?

(Whereupon, Government Exhibit Nos. 5 and 6 were marked for identification.)

By Mr. THORNBURGH:

Q. Now, again, Mr. Nixon, I show you what has been marked for identification purposes as Government Exhibit No. 5 and ask that you identify that.

A. This picture shows the pipe which we have identified as No. 231, and on the back in my handwriting are the numbers 231.

Q. Again, would you take the pen and circle the pipe that you have described as 231 and similarly identify Government Exhibit No. 6?

A. This exhibit is a close-up photograph of the discharge in question. On the back in my handwriting is No. 231. I believe I recognize here John Zavodni's handwriting—

Q. Whether or not it is his handwriting, what does it say?

A. It says, "Can't see pipe in picture."

This picture was taken below considerably and so all that was seen was the wooden collecting box that is in the photograph. The pipe is further in the background.

Q. Now, both these pictures were taken by you on August 7, 1970; is that correct?

A. Yes.

Q. And they are pictures of what you have identified through your code as outfall No. 231?

A. That's correct.

If I may add one thing, the colored photograph that you showed me a few moments ago was taken on the 19th. I had only one camera. One day I shot black and white and the next day I shot colored. And the next day I was there, I shot colored.

Q. It was taken on the 19th but it is a representation of No. 230?

A. Yes, that's correct.

Mr. THORNBURGH. Does counsel have any objection as to the introduction in evidence?

Mr. GONDELMAN. I have the same objection and I presume the same ruling?

The COURT. Do you have any different objection on the basis of the dates?

Mr. GONDELMAN. No, the dates don't bother me.

Mr. THORNBURGH. I offer Government Exhibits 5 and 6 into evidence and again ask the Court's leave that they be given to the Jury during intermission.

Mr. GONDELMAN. I have no objection to those subject to the statement I made to Your Honor previously.

The COURT. Yes, I understand. They are admitted.

(Whereupon, Government Exhibit Nos. 5 and 6 were received in evidence.)

By Mr. THORNBURGH:

Q. Now, after you had completed the sampling of what you identified as pipe 230 and pipe 231, where is the next sample you took?

A. That day?

Q. Yes.

A. As I recall——

Q. As you left the shore.

A. It seems to me—I can check that very quickly if you will——

The COURT. Well, does the next sampling have anything to do with the matter being tried here?

Mr. THORNBURGH. Yes, it does.

By Mr. THORNBURGH:

Q. Not the next outfall sample, the next water sample.

A. Oh, yes, excuse me. As soon as we left that point, we paddled out into the stream. At about midstream we took a sample of the river water at about one foot depth. John Zavodni took that sample. He stopped the bottle. I told him to label that No. 511–1.

Q. No. 511?

A. Yes. The 500 series of numbers designate midstream samples. So, anything with a 500 number comes out of the river directly.

Furthermore, of the 500 numbers, if it is a 501 or 502 and so on, it is taken above Lock and Dam No. 3. No. 511 was the first sample taken below Lock and Dam No. 3.

Q. And this one you took on August 7 was labeled 511–1?

A. That's correct.

Q. Was that sample taken upstream or downstream of the two outfalls?

A. Ordinarily we like to take samples upstream, but in this case we are very, very close to the lock and dam, so it is taken directly in front of and about in the middle of the river of those discharges. We could not get upstream for the dam.

Q. Now, with respect to the discharges here in question, that completed your activities on August 7, 1970; is that correct?

A. Yes, that is correct.

Q. Were those samples then furnished to Mr. Watts?

A. Yes, they were. By our standard procedure, Mr. Watts sent a man out who picked up those samples from the Science Building at Penn State University.

Q. Was there anything you did on August 7, 1970 with respect to the collection of these samples that varied from your usual procedure which you have already described?

A. No, sir.

Q. Now, I want to direct your attention to the 19th of August 1970, and ask you if you will for the benefit of the Court and Jury describe your activities on that date in the same manner?

A. On that date at approximately 3:32 p.m. of the 19th of August, in our canoe, we came to the same point, at No. 230.

Q. This is you and Dr. Zavodni?

A. Yes. I'm sorry, this was myself and a student of mine,

Mr. Thomas Young. Dr. Zavodni was out of town on his vacation, and Mr. Young agreed to take the samples for that day.

Q. Did you instruct Mr. Young as to how he was to proceed?

A. Yes, sir, I did.

Q. Were these the only samples that you took on that day?

A. No, sir. We took, I believe, approximately 25 samples that day. Most of those had been taken upstream at three principal locations on the Monongahela River. He did all of that sampling.

Q. Did Mr. Young follow under your instructions the same procedures that you and Dr. Zavodni had agreed to previously?

A. Yes, to the letter.

Q. Was there any departure?

A. None whatsoever.

Q. Proceed, please.

A. Mr. Young and I, in the same procedure that Dr. Zavodni and I had used, came up to the point of entry of the effluent from No. 230. This was, again, at 3:32, or approximately, on the 19th of August.

Q. P.M., in the afternoon?

A. Yes, sir.

Mr. Young then using the sample collector previously described collected the sample and put it into the sample bottle. The bottle was then stoppered as per usual procedure. I gave him the number 230–2.

Q. Once again, if you will just explain what that code means?

A. The number 230 is the pipe and the dash 2 is the second time we sampled that pipe.

He then wrote that number on the bottle and that completed our work with that particular sample except that I took that one colored photograph that I mentioned earlier.

Q. That would be Government Exhibit 4, the colored photograph that was taken on the 19th rather than the 7th?

A. Yes.

Q. What is the next sample that you took?

A. We went from that point downstream, again about a hundred feet, to the discharge we numbered 231.

When we approached that discharge, there was a man present at the discharge. He asked us what we were about, and we said that we were taking samples of effluent.

I asked him if he was from Pennsylvania Industrial Chemical Company, and he said no, he was a consulting engineer hired by that firm.

Q. Did Mr. Young take the sample there?

A. Mr. Young, as it turns out, did not take a sample at that location. We were about to, and it occurred to me that the engineer had a much better vantage point to take a sample.

I asked him if he would do so, and he said that he would and he took the sample for us. He held the bottle with a stopper in it directly under the wooden collecting box and collected that sample.

Q. Did he rinse the bottle?

A. No, sir, he did not.

Q. He took the sample without rinsing the bottle?

A. Yes, sir.

Q. Then he put the stopper in?

A. Yes, sir.

Q. Did he hand it back to you or Mr. Young?

A. He handed it to Mr. Young.

Q. That was marked what?

A. That was marked 231-2.

Q. Other than the presence of the individual who gave you assistance on August 19, 1970, and the fact that he didn't rinse the bottle in the effluent, was there anything other than your normal procedure that was followed?

A. No, sir, it was exactly the same procedure.

Q. What was the next water sample that you took on August 19, 1970?

A. Similar to the previous occasion that we have been at this particular location, we then paddled out into midstream directly in front of these discharges and took a midstream sample of the river at approximately a depth of one foot. Mr. Young took that sample. After he had collected the sample, I instructed him to label it 511-2.

Q. What did that mean, once again?

A. That it was a midstream river sample, that it was the first sample downstream of the Lock and Dam No. 3 in Elizabeth, and that would mean, of course, that it was the sample taken in front of 231 and 230.

Q. And the dash 2 meant what?

A. That is was the second such midstream sample we had taken at that location.

Q. Now, were these samples then turned over to Mr. Watts?

A. They were, by the same procedure. Mr. Watts dispatched a man to the Penn State campus who picked those samples up from the Science Building.

Q. Let me just summarize if I can, Mr. Nixon. I believe you have testified that you turned over to Mr. Watts, as a result of your sampling in connection with the matter we are concerned herewith, a total of six samples, 230–1, 231–1 and 511–1 taken on August 7, 1970?

A. That's correct.

Q. And 230–2 and 231–2 and 511–2 which were taken on August 19, 1970?

A. That's correct.

Q. Did you receive Mr. Watts' analysis of those six samples?

A. Yes, sir, I did.

Q. When you received that analysis and you had finished all of your sampling, what did you do with the samples and the analyses?

A. The samples remained in the custody of Mr. Watts.

Q. What did you do with the analysis?

A. The analysis I compiled for all of the discharges from these two sites together with the information as to location, who witnessed the samplings, who did the sampling and so on.

That information was accompanied with an affidavit and supplied to you on October 22 of last year.

Q. Now, at any time prior to the time that you turned this material over to the Government, did you tell Mr. Watts that samples 230–1, 230–2, 511–1 and 511–2 and 231–1 and 231–2 related to Pennsylvania Industrial Engineering Corporation?

A. No, sir. The only information Mike Watts had were the numbers written on the bottle.

Q. You gave him no way to decode the arrangement that you had set up?

A. I did not, not until long after you had the information.

Q. And you didn't tell him from where any particular sample had come from?

A. No, sir.

Q. You are not a chemist, are you?

A. I am not.

Q. And you made no assessment of the results of what Mr. Watts gave to you prior to turning it over to the United States Attorney?

A. I couldn't have.

Q. When did you finally complete your project on the rivers in 1970?

Mr. GONDELMAN. Objected to as immaterial.

The COURT. I don't see——

By Mr. THORNBURGH:

Q. It doesn't continue to the present time, does it?

A. It does not.

Q. It was completed prior to the time you turned it over to the United States Attorney's office on October 22?

A. Yes, sir.

Q. What would you estimate that the total expenses were that you incurred in carrying out this project?

Mr. GONDELMAN. Objected to as immaterial.

The COURT. Sustained.

Mr. THORNBURGH. May I just have a moment, Your Honor?

The COURT. Surely.

By Mr. THORNBURGH:

Q. I just have one question further, Mr. Nixon, with respect to the bottles that were furnished to you by Mr. Watts after you abandoned—your testimony indicates the use of those plastic bags. I want you to describe in what conditions those bottles came to you and what steps, if any, you took to supervise their presence in your possession.

A. The bottles came to us in large, sealed, corrugated boxes. The boxes contained 36 quart bottles each. Sealed inside the boxes would be a bag with stoppers for the bottles. We would open the boxes when they were delivered, examine the bottles and at that time place stoppers on the bottles.

In addition, at that time we would label the bottles with a blank label so that on the site, when we made use of each bottle, it could be labeled with the appropriate code number.

Q. When were they unstopped?

A. The next time they were unstopped was when the effluent went into the bottle for the first rinse out. After the sample was taken, they were then restoppered.

Q. So there will be no misunderstanding, it was these bottles and not the six-ounce plastic bags that were being used at sites 230, 231 and 511?

A. All six samples were collected in one-quart bottles.

Q. And the procedure that you described to insure the use was what you used in this case?

A. That's correct.

Mr. THORNBURGH. At this time, Your Honor, the Government has no further questions of the witness.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. As I understand it, Mr. Nixon, you did discover and read the Refuse Act or the Act of March 3, 1899, did you not?

A. Yes, sir.

Q. And did you find under that Act that, under the penalty provisions, the Court could award you one-half of the fine assessed against anyone who you reported to the Government of the United States as violating that Act?

A. That's correct.

Q. So that, you did understand that, if you then took your affidavit and these samples as described in your direct testimony to Mr. Thornburgh and he instituted this prosecution and the Defendant was found guilty and if he was fined, the Court could give you one-half the amount of that fine?

A. It could do so. That was my understanding.

Q. And, in fact, while you were doing this, you did contact the television stations and the reporters and they came out and took pictures of you paddling up and down the river in your canoe?

A. They did.

Q. That happened because you contacted them?

A. I called Mr. Lutz.

Q. You said, I am going up the river in my canoe to take samples; how about coming down, and he came down and took pictures and you were on television?

A. That is partly correct. Any television work that was done was done after the project was over, after all of our data was in, and on no occasion, single occasion, did anyone, whether it may be television or newspaper, ever use for publicity purposes any samples that we took for purposes of prosecution.

Q. But the fact that they knew you were taking samples and were engaged in the process is because you called the television station and they came in your instigation?

A. I called Mr. Luts.

Q. In fact, at one interview with Mr. Luts you stated, if these cases were successfully prosecuted, with the finder's fee you could buy a more luxurious boat or yacht instead of using the canoe; did you not say that?

A. What I said was that if we were able to get half the fine money that we would then be able to do such projects more efficiently with a better boat that would allow us to cover more river more expeditiously and which would allow us to take better pictures.

Q. You did use the word more luxurious boat and the word yacht?

A. I did not use the word yacht; I am certain of that. I have always had in mind to purchase, if I could ever afford it, a small houseboat which would allow me to do what I intend to do.

Q. In connection with your research, did you, in reading the Act, find that it provides for the Corps of Engineers to issue a permit?

Mr. THORNBURGH. Objection, Your Honor. It calls for a conclusion on a question of law.

The COURT. Would you read the question back to me?

(The reporter read the question.)

The COURT. You may answer that yes or no, and that is the conclusion of the matter.

The WITNESS. Yes.

By Mr. GONDELMAN:

Q. Did you then go to the Corps of Engineers in the City of Pittsburgh to see whether or not they had any procedure whatsoever for anyone to secure such a permit?

The COURT. That is what I said. He could answer yes or no. He has answered it, and that is the conclusion of the matter. He read the statute.

Mr. GONDELMAN. As to the statute——

The COURT. Nothing further along that line.

Mr. GONDELMAN. Can't I ask him what he did concerning his research?

The COURT. Yes, but I don't want any interpretation of the procedures from this witness.

Mr. GONDELMAN. I am not asking for interpretation. All I want to know is if he went to the Corps of Engineers.

The WITNESS. I went to the Corps of Engineers.

By Mr. GONDELMAN:

Q. Were you able to secure application for a permit?

Mr. THORNBURGH. There is no showing that this witness had any need.

The COURT. He isn't discharging any liquid. Why would he want a permit?

Mr. GONDELMAN. He had done his research. We have covered an awful lot of ground from this witness on direct which——

The COURT. Don't make any further comment along that line.

With your permission, I will run the Court, all right?

Now, ask him if he was discharging anything in the water; and, if he was, you can ask him about the permit.

Mr. GONDELMAN. I am respectfully declining to ask the question because it is obvious.

The COURT. Then I don't know why he would want it.

By Mr. GONDELMAN:

Q. You did go to the Corps of Engineers?

A. Yes.

Q. Did you go to the State Water Control Pollution?

A. No, sir.

Q. Did you ever walk off the boat and go around the property of Pennsylvania Industrial to see where the water that you had sampled had come from?

A. It is impossible to do that without trespassing.

Q. Did you know that the two-foot thing——

Mr. THORNBURGH. Objection. If Mr. Gondelman is going to state facts, I think he ought to be sworn.

The COURT. He can ask a question.

Mr. THORNBURGH. He started to ask about a two-foot thing, and there is nothing on the record at this time about that.

The COURT. Let me hear the question before we have an objection.

Mr. GONDELMAN. Let me go back because I thought there were two-foot things testified about, but let's see if we understand each other.

The COURT. Gentlemen, I have a Jury on which I must take a verdict.

I am going to recess this now until 2:00. Until that time, you will be able to look at those pictures and the Jury will see them.

Recess the Jury for retirement.

(Whereupon, at 12:20 p.m., Court was recessed until 2:00 p.m., the same day.)

AFTERNOON SESSION

The COURT. Mr. Nixon was on the stand and Mr. Gondelman was cross-examining him, I believe.

[David George Nixon resumed the stand and testified further as follows]

CROSS-EXAMINATION (CONTINUED)

By Mr. GONDELMAN:

Q. Mr. Nixon, I show you what has been marked as Government Exhibit 3 and ask you again what is shown on that exhibit.

A. That is a photograph of Discharge No. 230.

Q. In your looking at that when you were there on August 7 and August 19, did you notice, as it is shown on the exhibit, a concrete pipe?

A. Yes, sir.

Q. Did you know that that concrete pipe is a two-foot concrete pipe?

A. That was our approximate measurement.

Q. Do you know where that concrete pipe came from?

A. At that moment, no, sir.

Q. Have you since learned where that concrete pipe comes from?

A. I believe it comes from Pennsylvania Industrial Chemical Company.

Q. Did you make any attempt to discover whether or not that concrete pipe is in fact a sewer which services the houses which abut the property of the Pennsylvania Industrial Chemical Corporation?

A. We didn't have the money to afford a title search. We didn't have enough money to afford an official title search. It is my understanding that the United States Attorney's office would do what was necessary along those lines.

Q. As far as you know then, since you didn't do a title search nor did you just go up around the property and look at it yourself, which would have only taken you time, you do not know whether there are houses which dump their sewage, their wash-

ing machine water and other household refuse, if you will, into a sewer which then runs into that pipe which you saw on the Monongahela River?

A. That's correct.

Q. And yet you knew, did you not, under the Act, that, if it was a public sewer——

Mr. THORNBURGH. Objection, Your Honor. The question is going to call for a legal conclusion.

The COURT. That's right. I am not sure myself, if it is a public sewer, if it makes any difference. So, I don't think you can ask this witness that.

Mr. GONDELMAN. Then I misunderstood you this morning.

By Mr. GONDELMAN:

Q. The fact is that you personally made no investigation to determine whether it was or was not a public sewer?

A. As I stated, we could not afford such an investigation.

Q. My question to you is whether you made any attempt. That would not cost you any money, so that we get away from this poor kick. Did you or did you not?

Mr. THORNBURGH. I object.

The COURT. Don't do that any more.

The Jury will ignore the phrase "This poor kick."

Please don't make any more comments like the poor kick.

By Mr. GONDELMAN:

Q. You did not in any manner, shape or form, whether it would cost money or not, attempt to discover whether the two-foot concrete pipe was or was not a public sewer?

A. Yes, we did make such attempts as we were capable of making.

Q. What attempt did you make?

A. We asked the gentlemen that were employed by the Corps of Engineers at the lock and dam, which is immediately across the river at perhaps a hundred yards upstream from the discharges in question, whose company that was and who was discharging effluent at that point. We were told by those gentlemen that that was Pennsylvania Industrial Chemical and that they were the ones who were doing the discharge.

Q. Did you make any investigation as to whether there was anyone else discharging into the same outlet which you took your effluent from?

A. No, sir.

Q. You testified that you had a bamboo pole which you used, or it wasn't you. Who used the bamboo pole?

A. Dr. Zavodni.

Q. And to the pole was attached the bottle which was used to get the sample?

A. On that pole there is a plastic cup effect into which the sample or into which effluent is collected. That is the construction of the pole.

Q. In other words, the pole is used for the plastic cup to get the effluent which was poured into the bottle?

A. Yes. If I might add something or correct some earlier testimony, at No. 230 this morning I mentioned that we used that device to collect from, that is, from 230. In effect, the only time it was used in those cases was from 231. At 230, as the picture shows, effluent is coming down and pouring into the river off of rocks and in a very excessible manner that one can reach from a canoe. And in those cases and in this case, John Zavodni reached out of the canoe, putting a funnel into the bottle, and collected this effluent in that fashion.

Q. Showing you Government Exhibits 2 and 3, you are saying that your sample was taken from the water which is shown coming down over the rocks; is that correct?

A. That's correct.

Q. And you did not use a pole then, but you took it from the flow as it is shown on those exhibits?

A. Yes, at approximately that point.

Q. You are indicating now on Government Exhibit 1 a point just below the red circle when you put on Government Exhibit 1?

A. That's correct.

Q. Was that taken only from the flow or from the river?

A. That was taken before the effluent entered the river.

Q. Now, as to No. 231 on Government Exhibit 6, is that the area in which the samples were taken?

A. Yes, it is.

Q. Where or how did you get the sample which is referred to as 231?

A. Sample 231–1 was collected by John Zavodni using the bamboo pole and that device that I mentioned earlier.

Q. And that's where the plastic cup was attached to; is that correct?

A. The plastic cup is attached to the end of the bamboo pole, that's correct. That pole was used only on one occasion at that spot.

Q. How far was it from the river to the wooden structure which is shown on Government Exhibit 6?

A. May I see this?

I would suspect that it is approximately 15 feet in a direct line.

Q. From the canoe then to where the water is shown coming off of this wooden structure would be about 15 feet?

A. That's just a rough guess. We did not attempt to take that measurement.

Q. How long was your bamboo pole?

A. About ten feet.

Q. Well, then, how did the bamboo pole which was ten feet reach a point which was fifteen feet from the river?

A. I never said it did. The effluent was collected after it comes out of the settling box and comes down on this step-looking affair. It flows over the rocks. The cup was situated somewhere over these rocks. As it poured over the rocks, it filled the device.

Q. So we understand it, then the effluent was not taken as it is shown dripping on your photograph from the wooden structure but rather after it had hit and filtered down over the rocks below the structure?

A. That is half true. That is on 231–1. On 231–2, the consulting engineer took a sample directly out of the settling box here.

Q. That was on the occasion of what, August 19?

A. Yes, sir.

Q. On that occasion when you went out to take your sample, there was someone who identified himself as a consulting engineer?

A. That's correct.

Q. And you told him what you were doing?

A. Yes.

Q. You said you would like to get a sample of the effluent which is shown on the picture flowing from the wooden structure?

A. Yes.

Q. And he took the bottle from you or from this doctor who was with you on that occasion?

A. Tom Young was with me on that occasion.

Q. And I guess Tom Young gave the bottle to him?

A. Yes, it was the quart bottle.

Q. And this gentleman, who identified himself as a consultant, filled it and gave it back to you?

A. Yes, he took the sample.

Q. Was there any discussion between you and that gentleman as to what he was a consultant for?

A. He said he was a consulting engineer or he was consulting for Pennsylvania Industrial Chemical Company. He didn't say precisely what his duties were.

Q. Now, in connection with your research, did you at any time check with the Commonwealth of Pennsylvania to determine whether the Pennsylvania Industrial Chemical Corporation had a permit under the state law——

Mr. THORNBURGH. Objection, Your Honor. The question is irrelevant.

The COURT. Irrelevant, incompetent and immaterial whether he did or didn't.

You will recall, ladies and gentlemen, in my original instructions I said you should draw no inferences when a question is asked, an objection made and the objection sustained. You must draw no inferences from the question being asked, what the answer would have been, at all. And, of course, the question in itself is never evidence.

By Mr. GONDELMAN:

Q. When you took your midstream samples, your serial numbers 511, as I understand it, you took them approximately directly across from the Pennsylvania Industrial Corporation plant; is that correct?

A. Yes, sir.

Q. Do you know whether the sample that you took from midstream would have contained any of the matters which were discharged into the river by the Defendant?

A. Do I know what the chemical composition of the river is?

Q. That is not my question.

A. I am sorry. Then I don't understand the question.

Q. My question to you is, when you went out to the middle of the river to take a sample from midstream, could you tell whether any of the sample which you took from midstream contained any matter which had been discharged from the Defendant's plant and had been carried to the point at which you took your sample?

A. I could not make that determination visually.

Q. You don't know whether it did or not? You don't know one way or the other?

A. I know I didn't make that judgment, yes.

Q. So we understand, you didn't make the judgment, but the answer to my question is you don't know whether it did or it didn't; is that correct?

A. That's correct.

Q. Thank you. After you took the samples, you said you took them where?

A. We took the samples and brought them back in the canoe, loaded them into my automobile or John's automobile as the case may be. They were then taken to the Biology or Science Building at Penn State, McKeesport campus. They were taken into the biology lab stockroom where they were stored under lock and key until such time as the man from Allegheny County was dispatched by Mr. Watts to pick them up and take them to the laboratory.

Q. On the samples taken August 7, 1970, how long were they stored at Penn State before they were picked up and taken to the Allegheny County Laboratory?

A. My memory is not—it seems to me it was the next day.

Q. How about the samples which were taken on August 19; when were they picked up?

A. Again, I think it was on the 20th, but I am not sure of those dates, sir.

Mr. GONDELMAN. I have no further questions.

The COURT. Have you any redirect?

Mr. THORNBURGH. Just two questions, Your Honor.

The COURT. Before you do that, I wonder if I could see counsel at side bar for a moment.

[At side bar.]

The COURT. In your question you made a point about a public sewer and said something about a public sewer and then you said you must have misunderstood me. Is there a distinction between a public sewer and a private sewer?

Mr. GONDELMAN. I don't know if there is, but this is a public sewer which is excepted in the Act.

The COURT. Sewers are excepted in the Act under certain conditions.

I want to know if there is any authority for the public situation, whether it is public or private.

Mr. GONDELMAN. I don't know of any.

The COURT. You added the word public.

Mr. GONDELMAN. I do not see the distinction, and I don't like to engage in an exercise simply because I want to look it up. This is a public sewer.

The COURT. Does that make any difference? That's what I am asking. If it does, I would like to see the authority.

Mr. GONDELMAN. The act says sewers are excepted. I am making it better. It is a public sewer which ought to be better than a private.

The COURT. Is there any authority that a different rule applies from a public to private that you know of?

Mr. GONDELMAN. I know of none.

Mr. THORNBURGH. The stipulation was that this pipe was owned by the chemical company; is that not right?

Mr. GONDELMAN. Sure.

Mr. THORNBURGH. It is owned by them?

Mr. GONDELMAN. Yes, but it is a receptacle of a public sewer.

Mr. THORNBURGH. You mean a public sewer flows into——

Mr. GONDELMAN. And out of it.

Mr. THORNBURGH. And that is all.:

The COURT. I couldn't see what public had to do with it.

Mr. GONDELMAN. I am simply attempting to show and I will show that this is a public sewer. Whether it makes any difference if it becomes a private sewer—I don't think it is, but I think is is even stronger.

[In open court.]

The WITNESS. Could I make a comment?

Mr. Gondelman this morning before lunch asked me if I had called the Press and I said that I had called Mr. Lutz at WQED. I was reminded over the lunch break by Mr. Lutz that it was he who called me and not the other way around. I just wanted to make that clear.

REDIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Now, in your answer to Mr. Gondelman's question, Mr. Nixon, you indicated that the actual samples, except for the assistance of a man who identified himself as a consulting engineer, were taken from flow off of the rocks?

A. Yes, that's correct.

Q. Now, based on your recollection and referring again to these pictures here, were you able to observe where that flow off the rocks came from?

A. There was no question about it. The bank is completely dry——

Q. Let's take 230 here.

A. The bank in this entire area is dry. This is quite a sizeable flow, so there is no mistaking where that discharge comes from.

Q. That discharge was from the two-foot concrete pipe?

A. It was.

Q. Were there any other visible sources of the discharge in that area?

A. With the exception of 231, no.

Q. I am speaking now of the concrete pipe. Were there any other pipes in that area, anything else coming out of there?

A. We certainly didn't see anything, sir.

With respect to 231, I would ask you the same question. You indicated that the first sample there was taken from water that was flowing onto the rocks and down into the Monongahela River. Could you observe what the source of that was?

A. It is positively unmistakable that that effluent came from that pipe.

Q. Were there other pipes you saw in that area?

A. We saw none.

Q. No other discharge?

A. No.

Q. So that your testimony is, with respect to 230 and 231, to the best of your observation and knowledge, the samples that you collected, that Dr. Zavodni and Mr. Young collected off of the rocks were of liquid coming out of the identified sources of discharge that you have testified about?

A. That's correct.

Q. Do you have any question about that?

A. None whatsoever.

Mr. THORNBURGH. That is the only redirect I have, Your Honor.

RECROSS-EXAMINATION

By Mr. GONDELMAN:

Q. So we understand each other completely, Mr. Nixon, you say that the flow from which the samples were taken came from these pipes?

A. That's correct.

Q. However, you were unable to observe the source from which that flow came to get into the pipes?

A. That's correct.

Mr. GONDELMAN. That is all, sir. Thank you.

Mr. THORNBURGH. You are excused.

The COURT. Will anybody have further need for this witness?

Mr. THORNBURGH. I would not anticipate anything specific, Your Honor, but I would appreciate it if he would not be excused.

The COURT. All right.

Mr. THORNBURGH. Dr. John Zavodni.

[John J. Zavodni called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Would you state your full name for the record, please?

A. John Joseph Zavodni.

Q. What is your address?

A. 751 Sylvester Way, McKeesport.

Q. How long have you lived there?

A. Approximately three years.

Q. How old are you?

A. Twenty-eight.

Q. And are you a native of Western Pennsylvania?

A. I was originally from Gallitzin, Pennsylvania, which is more central.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. No children.

Q. Where did you obtain your education?

A. My undergraduate degree is from St. Francis College in Biology, St. Francis of Loretto. My Doctorate is from Penn State University. It is in physiology.

Q. Dr. Zavodni, you are not a medical doctor?

A. No, a Ph.D.

Q. And that Ph.D. was in what subject?

A. Physiology.

Q. By whom are you presently employed?

A. Penn State University at McKeesport campus.

Q. What is your position?

A. Assistant Professor of Zoology.

Q. How long have you been in that position?

A. Three years.

The COURT. I wonder if we could find out what zoology is and what physiology is?

The WITNESS. We have only three titles, Professor of Biology, Zoology or Botany.

The COURT. I just want to know what they are.

The WITNESS. Biology would encompass both being authoritative in plant and animal organism. Zoology deals with animals. Physiology is a specialized study of the function of organism, how do the adrenal glands function, and so forth. Its basis is more or less like that of the medical practice.

By Mr. THORNBURGH:

Q. Are you a member of any scientific societies or organizations, Doctor?

A. Yes, several.

Q. What are those?

A. I was nominated for the New York Academy of Science and was elected in the Aerospace Medical Section; Pennsylvania Academy of Science and the Aerospace Physiological Section.

Q. Are there all honorary memberships, honorary societies?

A. The two honoraries I mentioned were Sigma Pi and Phi Kappa Pi. The others are non or working organizations where papers are given and so forth.

Q. Now, Dr. Zavodni, I think you were present in the courtroom this morning during Mr. Nixon's testimony and this afternoon, were you not?

A. Yes.

Q. And rather than repeat the questions that I asked him this morning, was the testimony that he gave, insofar as you are personally knowledgeable about the activities that he described, substantially correct?

A. Yes.

Q. And do you recall August 7, 1970?

A. Yes, I do.

Q. And was the description of your activities given this morning by Mr. Nixon substantially accurate specifically as to August 7, 1970?

A. Yes, it was.

Q. Let me ask you again. On August 19, 1970, Mr. Nixon testified that you were on vacation and that Mr. Young had accompanied him. Is that substantially as you recall it?

A. Right.

Q. Did you have an opportunity to talk to Mr. Young before August 19, 1970 with respect to this?

A. No, I didn't.

Q. Specifically with respect to the plan of action that Mr. Nixon described to you in the spring of 1970, what was your role to have been in that operation?

A. Well, we were both going to take the samples, and then I had theorized that I would probably do the analysis. I had no idea how many samples we would have. I had some background, and I thought I could accumulate some equipment to get the analysis of the samples.

Q. Had you ever done sample analysis?

A. In some of my courses, yes, I had.

Q. Did you ever analyze any of these samples that were taken?

A. No.

Q. You have heard Mr. Nixon testify that he took the photographs described as Government Exhibits 1 through 6, I believe?

A. Yes.

Q. And does that comport with your recollection insofar as you were present on August 7?

A. Yes, he was in back of the canoe and he was taking pictures.

Q. When did you learn of the provision of the statute that provides for retainment of so-called bounty with respect to refuse dumped?

A. It was on the same day that Mr. Nixon came down and asked me if I would help him out, and he talked about the law. He said that, if there is any industrial waste being dumped in navigable waterways, there has to be a permit; and, if not, it is in violation of the Act. And I thought it sounded like we might be able to go out and, if anything is being dumped and there is no permit, be able to clean up the river in some way.

Now, there was another faculty member present, and it was only later when we walked out into the hall that he had mentioned to me that there was another part; the fines that could

be levied, could be shared or split amongst the individuals who turned in the information or supplied the information.

Q. Did Mr. Nixon put your participation on this project on the basis whereby you could make some money out of it?

A. No, because nothing was said about making money. We were just going to clean up the river if possible.

Q. Did he ever mention to you that his involvement in the project was viewed as a money-making operation?

A. No.

The COURT. Ladies and gentlemen, this is being given to you so you can weigh the testimony of these witnesses, determining their credibility, weigh the interest that they might have. Certainly, you would not be required to determine whether or not, if there were a fine, any part was to go to either of these men. It would not be a matter for you to consider. This is being given to you only so you can weigh the credibility of their testimony as influenced by the possible interest.

By Mr. THORNBURGH:

Q. Now, Dr. Zavodni, I want to direct your attention, as I did Mr. Nixon's, to the exhibits, the photographs.

First of all, the four photographs relating to what has been identified as Outfall 230; that is Government Exhibits 1 through 4. With respect to the discharge coming over the rocks, Mr. Nixon testified that you took the sample from that flow over the rocks; is that as you recall it?

A. Right. We could pull the canoe right up to the bank, and it was possible to reach over the canoe with a sample bottle and funnel and insert this to a stream of effluent coming out of the rock.

Q. Could you determine the source of that effluent visually?

A. In all indications, it seemed to be coming from this pipe up on top of the settling box. It was a direct stream. It was a direct stream coming down from that pipe.

Q. Did you see any other source of discharge in that area?

A. No, I did not.

Q. Based on your observation at that time and as with reference to Government Exhibits 1 through 4, where did you think that this was coming from?

A. From the concrete pipe in the settling box.

Q. With respect to 231, Government Exhibits 5 and 6, I would ask you the same question with respect to the first time that

you were there or the only time that you were there. You took that sample with the bamboo pole, Mr. Nixon said?

A. Right.

Q. And that was also off of a flow off the rocks?

A. The sample on 231 was taken higher up because it was a smaller flow and it spread out too much to collect it lower. So I used a sampling pole so I could collect the effluent running over the rocks.

Q. Could you tell what the source of that effluent running over the rocks was?

A. It was coming in all cases down the bank from the settling box. It was a narrow stream. The bank was wet on a parallel line.

Q. And there was no other apparent source of discharge that you saw?

A. None that I saw.

Q. Again, just to emphasize, Dr. Zavodni, you heard Mr. Nixon describe the manner and means in which the bottles were delivered to you from the County, were handled by you and the manner in which they were returned to the County. Was his testimony as you heard it substantially correct in that part?

A. Yes, it was.

Mr. THORNBURGH. Your Honor, Dr. Zavodni's testimony is mostly cumulative, and I don't want to take any more time with him. I turn him over to Mr. Gondelman.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Doctor, I think Mr. Thornburgh described Mr. Nixon as Mr. Clean. What did they give you as an appellation, if anything?

A. I guess I was Mr. Dirty then.

Q. Let me ask you; Mr. Nixon told you that, if an industrial concern did not have a Federal permit—you correct me if I am wrong. I think this is what you said in direct, that, if an industrial concern did not have a Federal permit, they were violating the Federal Refuse Act; is that what you said?

A. I think that is essentially what Mr. Nixon told me. Again, it has been a while so I may be wrong but that is what I recollect.

Q. That is the best of your recollection as to what he told you?

A. Right. And he added that there was a fine for violation of the Act, that people could be fined for dumping into the river.

Q. And he added later on that maybe you and he could share in the proceeds of that fine if the Court would so award it?

A. Yes. Later on he said the fine could be shared by the——

Q. I take it then that, since he told you that a firm could violate the Federal Act if it did not have a permit, that then you and he did investigate to determine which firms had a Federal permit before you went up and down the river collecting your samples?

A. Mr. Nixon took care of that, yes.

Q. He looked to see if they had permits?

A. Right.

Q. Not you?

A. No.

Q. And, as I understand it, referring to these exhibits, what you are saying is that the fluid that you see coming out of the pipe is where it came out of and you could see it flowing down the bank; is that correct?

A. We could see it flowing from the pipe.

Q. However, you could not see how it got into the pipe or source from which it got into the pipe or from where it came from?

A. No. sir.

Mr. GONDELMAN. That is all, sir.

Mr. THORNBURGH. No further questions.

The COURT. You may step down now.

Mr. THORNBURGH. Thomas Young.

[Thomas William Young called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Would you state your full name for the record, please?

A. Thomas William Young.

Q. Where do you live, Mr. Young?

A. 3730 Lindell Street. It is in Castle Shannon.

Q. How long have you lived there?

A. Well, my parents have lived there about 19 years. I have lived there about 15.

Q. You live with your parents?

A. Yes.

Q. How old are you, Mr. Young?

A. Twenty-four.

Q. Are you married?

A. No, I am not.

Q. What is your present occupation?

A. I am a sophomore at Penn State University, McKeesport campus.

Q. You are in your second year there?

A. Yes, I am.

Q. Prior to that time, how were you occupied?

A. I was doing active duty in the United States Marine Corps, four years.

Q. Where did you serve during that time?

A. Various posts throughout the United States, 13 months in Vietnam.

Q. Are you attending Pennsylvania State University under the so-called GI Bill?

A. Yes, I am.

Q. What field of study are you in at Pennsylvania State University?

A. Presently I am enrolled as a political science major.

Q. Are you a student of Mr. David Nixon?

A. Yes, I am.

Q. Were you a student of his a year ago, in 1970?

A. Yes, I was.

Q. Now, again, rather than draw out your testimony, I will ask you if you were present in the courtroom this morning and this afternoon during the testimony of Mr. David Nixon?

A. Yes, I was here.

Q. And you heard Mr. Nixon testify with respect to your assistance given to him on the 19th of August, 1970?

A. That's correct.

Q. Was that testimony substantially correct as you now recall it?

A. Yes, it was.

Q. And it correctly described your activities with Mr. Nixon

at that time at sites 230, 231 and 511 which we have referred to through the course of this proceeding?

A. Yes, he did.

Q. I want to ask you particularly about the outfall at 231 which I believe is depicted in Government Exhibits 5 and 6 on your right there and in particular what your best recollection is of the activity that you undertook with respect to that outfall?

A. Well, on that particular day, August 19, we had just come out of Lock No. 3 and proceeded across the river to take a sample. This was a second sample that we did take at this site.

I distinctly recall in approaching the bank there was an extremely strong smell coming from someplace, and I mentioned it to Mr. Nixon. We remarked about it.

And as we approached the site, there was a man dressed in a white shirt and a hard hat toward the right-hand side as we were facing the wooden apparatus.

Q. Were you in the canoe at the time?

A. Yes, we were. And the man had asked us what we were doing or what we were about to do.

And Mr. Nixon answered him that we would like to take a sample at this point of this stuff being discharged. And the man said—well, we proceeded to get our bamboo pole to get to the procedure of taking the sample, and the man said, instead of going through all that trouble, he said, I will come down the bank, and he did come down the bank, capped the container from me, went back up and held the bottle with the funnel underneath the V part of the wooden apparatus and filled the quart container. He took out the funnel, recapped the bottle and, as he passed the container back to me, I noticed that the container itself—some had splashed around the edge and the funnel, and it had the same smell that I had smelled before or we both smelled as we had approached the shore.

Q. So that you actually didn't take the sample? It was taken by the gentleman on the shore?

A. That's correct.

Q. Did he identify himself to you, as you recall?

A. We asked—it was a very casual type of conversation. I don't think we challenged him or his authority. He didn't actually challenge us, but it came out in the conversation that he said he was a consulting engineer then working for Picco.

Q. That is Pennsylvania Industrial Chemical Company?

A. That's correct, yes, sir.

Q. Now, Mr. Young, I want to ask you the same questions with respect to the source of the discharge depicted in these six pictures here. Looking at what has been identified as Discharge No. 230, you took a sample of that on August 19, 1970?

A. Yes, I did.

Q. And that was taken at the water's edge?

A. Yes, sir.

Q. To the best of your recollection and looking at these pictures here, could you tell what the source of this effluent coming over the rocks was?

A. Yes, sir, the source was this concrete pipe at the top of the bank.

Q. Was there any other source, possible source, of that discharge that you saw on that day?

A. Not that I could see.

Q. Now, with respect to what has been identified as Discharge 231, I would ask you the same question. No, I won't because you didn't take that off of the rocks. That was taken, as I think you testified, by the gentleman?

A. Yes, sir.

Q. Now, before you were out on the river on that day, did Mr. Nixon give you any instructions as to how you were to proceed?

A. Yes, sir. He had asked me the night before if I would give him a hand in the canoe taking some samples on the Monongahela, and I told him that I would. So he proceeded to tell me that night approximately what I would have to do, how he did go about taking the samples. He continued when we did get on the river in the canoe, and the first few samples that I took that day were under his direct observation. I was making a few mistakes getting the feel of the pole and the procedure of it, and he corrected me; and, as we went along, he observed me until it was as best as I could do.

Q. Did you think you had the hang of it by the time you got to these, 230 and 231?

A. Yes, we took these on our return trip, coming back towards McKeesport.

Q. How did he happen to approach you to help him on August 19?

Mr. GONDELMAN. Objected to as immaterial. It is also a question which should have been asked of Mr. Nixon.

Mr. THORNBURGH. That's right. I will withdraw the question.

I don't have any further questions.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Mr. Young, as you observed, whether you took the samples or not, which you say you didn't, of Exhibit 6, all you are saying is that you saw the liquid state coming out of two pipes, and it was a liquid state?

A. Yes, out of this pipe.

Q. And you have no way of knowing, being down in the canoe, what the source of that liquid was prior to your seeing it coming out of these pipes and down the bank into the river?

A. No, sir.

Mr. GONDELMAN. O.K., thank you.

The COURT. You may step down.

Mr. THORNBURGH. Your Honor, do you intend to take an afternoon recess?

The COURT. I do. I wasn't going to take it for 20 minutes. You want it now instead?

Mr. THORNBURGH. As long as we are not going to eat up any more time. If we can take it now, it would be more appropriate. I would like to have a chance to confer with my next witness.

The COURT. All right, we will take a ten-minute recess.

(A short recess was taken after which the following proceedings were held in Open Court:)

Mr. THORNBURGH. I call Michael Watts.

[Michael R. Watts called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Would you state your full name for the record, please?

A. Michael R. Watts.

Q. Where do you live?

A. 200 Walter Lane, Springdale, Pennsylvania.

Q. How long have you lived in the Springdale area?

A. Since 1925.

Q. By whom are you employed?

A. Allegheny County Bureau of Tests.

Q. In what capacity?

A. Chief of the Allegheny Bureau of Tests.

The COURT. Is there any question at all as to this man's competency or expertise?

Mr. GONDELMAN. I will stipulate to his competency and expertise and as to his reports in connection with the samples which were submitted to him on August 7 and August 19, 1970.

The COURT. Will you stipulate that the samples that he tested were the samples that were handed over to him?

Mr. GONDELMAN. By Mr. Nixon or Dr. Zavodni.

Mr. THORNBURGH. That is 230–1 and 230–2, 231–1, 231–2, 511–1 and 511–2 were in fact analyzed by Mr. Watts after having been received from Mr. Nixon and/or Dr. Zavodni and that the results of those tests are accurate.

The COURT. Is that all right, Mr. Gondelman?

Mr. GONDELMAN. I will so stipulate, Your Honor, as to those six tests, samples, six reports.

The COURT. Thank you, Mr. Gondelman.

Ladies and gentlemen of the Jury, that means, instead of going through all the routine, it is agreed that this man got these samples, that he tested them and the tests were accurate. All he has to do is to give us the results of these tests.

Mr. THORNBURGH. Your Honor, the first question was as to Mr. Watts' competency and expertise, his qualifications as an expert in water sample analysis.

Mr. GONDELMAN. Those are agreed on.

The COURT. He is an expert; he did test these six samples which he got from the people that you heard about, and his results are accurate. Now we are going to hear what his results were.

By Mr. THORNBURGH:

Q. Now, Mr. Watts, if you will refer to the results of your analysis. I refer you first to the sample designated 230–1.

Now, let me ask you first, Mr. Watts, just to clear our record here, when you received these quart bottles from Mr. Nixon or Dr. Zavodni, you received them only with the code designation on them?

A. That's correct.

Q. Did you not know from whence they came?

That's correct.

Q. With respect to 230–1, we will take a little bit longer with that one because it is the first one, with the Court's indulgence, so we get the ground rules.

That is on Page 36 of your addendum, 230–1. Are you there?

A. Right.

The COURT. Will you tell us what that is, on what date it was taken and whether it was from the concrete pipe or the iron pipe?

Mr. THORNBURGH. Shall I tell it?

The COURT. Yes.

Mr. THORNBURGH. The 230–1 is the sample taken from the concrete pipe on the 7th of August, 1970.

The COURT. In other words, that is Count 1 of the Information?

Mr. THORNBURGH. That's right, and I will go through them 1, 2, 3, 4.

The COURT. In order of the counts in the Information?

Mr. THORNBURGH. Yes, 230–1, 230–2, 231–1, 231–2.

By Mr. THORNBURGH:

Q. Now, first, as I said, on this initial go around, Mr. Watts, would you explain in as brief terms as you can the actual test that you conducted? That is, beginning at the top of the report page is the designation pH. Now, because we are all laymen in this area, we are going to have to rely on you to educate us.

Will you tell us what those tests were and then maybe, relating to the 230–1, what that result indicates?

A. As far as the pH test, we have a yardstick where we measure distance by inches as far as measuring the degree of alkalinity and acidity. We have a pH rule. We have found out that ordinary pure water has a pH of 7. That is neutral. Anything below, 6, 5, 4, 3, 1, zero is an increase in acidity. Anything above 7 is an increase in caustic alkalinity, up to 14.

Q. Would that have been the first test that you ran on all these tests?

A. That's correct. We have organic compounds whereby they have a specific area in color.

Q. Excuse me. I don't think we have to get into the actual test that you went through. I think it has been stipulated that you carried it out in conformity with accepted practice.

Mr. Watts, look at 230–1. What was the pH that you derived?

A. We got a pH of 8.8.

Q. What does that indicate to you?

A. Rather high pH that you don't normally find in natural waterways.

The COURT. It is not acidity?

The WITNESS. It is on a caustic side.

By Mr. THORNBURGH:

Q. What is the next test that you ran?

A. Alkalinity.

Q. What result did you get there?

A. 1070 parts per million.

Q. Would you explain just once what you mean when you say parts per million?

A. Take for example a pound of salt and a million pounds of water would be one part per million.

Q. One pound of salt in a million pounds of water, that is one part per million?

A. Right.

Q. So, what was the figure?

A. 1070.

Q. That is 1070 pounds of what?

A. In a million pounds of water.

Q. Of what?

A. Salts in terms of calcium carbonate.

Q. What would that indicate to you, 1070 parts per million?

A. That would be an unusually high alkalinity for an ordinary water.

Q. So, you got two tests so far, both of them indicating a degree of alkalinity?

A. A degree of pollution, I would say.

Q. Well, let's talk about the chemical qualities.

A. All right.

Q. What was the next test?

A. Ordinary hardness, 52 parts.

Q. What does that indicate to you?

A. That indicates to me—not knowing what the sample was at the very beginning, it indicates that there is very little calcium and manganese in there to give me a hardness test indicating that there is a lot of either the potassium or sodium salt in their radical, either one of the radicals to give you the softness.

Q. Is that hardness in the term that my wife would think it is hard or soft water?

A. The 52 parts per million, you divide that, 17.1 part per million is equivalent to one grain per gallon of hardness. So, the average public speaks of one, two, three or four or five grains of hardness per gallon. In this case here, 17 would be three gallons per grain of hardness.

Q. Is that hard or soft?

A. I would consider that soft.

Q. What is the next test that you got a result?

A. We got a high aluminum, 40.4 parts per million.

Q. That wasn't the next test performed?

A. Performed an iron test, four-tenths, which is a very small amount of iron in it.

Q. And the next one?

A. The next one was 40.4 parts of aluminum which is unusually high in ordinary water.

Q. What was the next test?

Q. Manganese, one-tenth. That could come from the equipment, sometimes from the water used.

Chlorides, 20 parts. That is not a very high figure. You would probably find 10, 15 parts in a normal stream.

Q. What about the next one?

A. Phosphate, zero.

Q. Zero is zero, I guess?

A. Right, indicating that there is no phosphate radical in there. No phosphate salt was used in the process.

Q. Next?

A. Sulphate, 262 parts. It is normal.

Q. And the next one?

A. Cyanide. We ran that and we didn't find any cyanide.

Q. Now, those tests were all run by you with respect to the concentration of the particular element that you were talking about?

A. Right.

Q. What was the next test that you performed?

A. Total solids.

Q. What do you mean by total solids?

A. What we do, we take a hundred cc. samples. We work with the metric system. It would be roughly over three ounces. We put in an operating dish which has been preweighed and put it on a water vat and the steam evaporates all of the water and all you have left is a residue like you have in a teakettle in boiling water. Then we put that in the oven to make sure it is

dehydrated, no moisture in there, in those salts, and we reweigh it again and you get the total solid figure there.

Q. Those were solids that were in the original sample that you used?

A. Right.

Q. What was the figure?

A. 12,898 which means 12,898 per million pounds of water.

Q. What does that indicate to you?

A. Well, that indicates that that is a very high amount of disolved solids. Normally, even in a river, you would be fortunate if you got 500 parts.

Q. Five hundred?

A. Five hundred parts during a dry spell.

Q. What was the next test that you performed?

A. Volatile solids. That is the difference between a fixed and the total. In other words, after we weigh the total, then we place that sample in a muffle electric furnace at about 1300 degrees centigrade. We burn that for an hour. It will carbonize what is there, organic matter or whatever else is in there. So, the difference in there between the two, which is fixed, we weigh that again and that means there is a loss. We have a loss. So, the loss of volatile solids is 753, and that could be due more so to inorganic chemical salts that would be changed from sodium carbonate to sodium oxide during the burning process.

Q. What is the figure for volatile solids?

A. 753.

Q. Does that indicate anything to you?

A. I just mentioned it. That is a somewhat low figure for the amount of salt and I would consider that as inorganic chemicals that are changed over from say soda ash or sodium carbonate to sodium oxide.

Q. What is the next test?

A. Fixed solids, 12,145.

Q. That is just the difference between the two?

A. Between those two.

Q. What is the final test that you made?

A. Suspended solids, 140 parts per million which anything over a hundred I consider should be considered.

Q. Now, those figures that you have just run through with respect to what we identified as 230–1 set forth in Count 1 of the Information, August 7, when were these tests performed?

A. They were submitted to the laboratory, 8/10/70, and we immediately started to analyze them.

Q. Mr. Watts, I would like next to direct your attention to Sample 511–1 which is on Page 37. That has been identified here in Court as the midstream sample taken on August 7, 1970.

I wonder if you would interpret the same figures out of Sample 511–1 that you just reviewed with respect to 230–1?

A. The pH is 6.4.

Q. What does that indicate?

A. That indicates that we have got some sort of acidity in that water.

Q. Would that be unusual for the Monongahela River?

A. No. And it also gives us some idea that there must be some acid salts that will hydrolyze; and, when they hydrolyze, it forms an acidity and uses up some of the alkalinity that you already have as a reserve. In other words, total alkalinity is 8 parts per million.

Q. That is the second test, right?

A. Right. Actually, we have no bicarbonate. We have no free mineral acidity because you only get that with a pH of 4, 4 or less. And we have total acidity due to acid and iron-aluminum salts. In this case we have—

Q. That is the first test?

A. Right.

Q. That is one that wasn't performed on 230–1?

A. The reason it wasn't performed there, we had different conditions.

Q. This is acidic and that was alkaline?

A. Right. In other words, we couldn't have any acidity due to iron-aluminum salts. Of a pH of 8, 8 would be blocked out when interfered.

Total acidity, I gave you. Hardness, 164.

Q. That is the fourth test?

A. Right.

Q. Nothing unusual there?

A. It is to be expected. We are getting water from the Maryland and West Virginia area and there is some coal mine drainage.

Iron, you have one-tenth. Aluminum, 1.1.

Q. Iron is No. 5 and aluminum is the sixth test?

A. Right. Aluminum is 1.1 part. Manganese, three-tenths of a part per million which is to be expected since we know we got iron-aluminum salts there. We know that could be from mine drainage or the company pickling liquors also.

Q. Chloride?

A. Nothing unusual, eight parts per million. That is slow. That is an indicator. If we have a high chloride, say 30, 35, it could be due to sewage. If it is higher than that, it could be due to industrial waste. If it goes on up higher, it could be overflow from spinned glass valves.

Phosphate, it's not too high, eight-tenth of a part per million.

Sulphate, 267 parts. That is not so high for the time of year that it was collected.

Cyanide, none.

Total solids, 348.

Volatile solids, 112.

Q. What about the total-solids figure? Is that an unusual figure, 348?

A. That was collected in August, and you are going into that dry spell where you don't have too much dilution. So, that would probably increase even by November. It might go all the way up to 500 parts per million.

Fixed solids, nothing unusual on that.

We didn't run any suspended solids.

Fixed solids, 236.

Condition of sample, I have potential acidity.

Mr. THORNBURGH. Excuse me, Mr. Watts.

Could we approach the bench for a minute, Your Honor?

[At side bar.]

Mr. THORNBURGH. I am waiting for some exhibits that will come down that will be more understandable to the Jury.

I have some small exhibits here, and I will go ahead, but the Corps of Engineers people are making them.

The COURT. What do you want to do?

Mr. THORNBURGH. I don't know.

Mr. GONDELMAN. I can't try his case. I am silent.

The COURT. I am not asking you for any comment. I am just thinking.

Mr. THORNBURGH. I want to ask for another recess.

The COURT. You want a recess?

Mr. THORNBURGH. I hate to do that.

The COURT. How long would it take?

Mr. THORNBURGH. They should have been here for 3:30 p.m.

The COURT. I will tell the Jury that we are waiting for some exhibits.

Mr. THORNBURGH. I apologize.

[In open court.]

The COURT. Ladies and gentlemen of the Jury, Mr. Thornburgh informs me that he is waiting for some exhibits. We are going to declare a recess until those exhibits get here at which time we will take up again. We will recess until those exhibits get here.

(A short recess was taken after which the following proceedings were held at side bar:)

The COURT. You are making an offer of two exhibits; is that correct?

Mr. THORNBURGH. That is correct. They are blowups of the agreed to reports of Mr. Watts, the chemist. The reason I was waiting for them, just reading them into the record would be weeks.

Mr. GONDELMAN. I stipulated as to the accuracy of Mr. Watts' reports. However, I did not stipulate as to their admissibility in evidence in their total.

The COURT. Of course.

Mr. GONDELMAN. And I call Your Honor's attention to the fact that the first count of the information charges them, the Defendant: The Defendant did deposit certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals and chlorides, deleting phosphates and sulfates and getting into solids.

As far as I am concerned, the only way I knew how to prepare for this case, that we didn't deposit the specific matters that are set forth in the information, and the same goes for Count 2, 3 and 4. Now, when you get into the entire report, Your Honor will see that there are factors in the entire report which had nothing to do with the specific items which the Defendant is being charged with depositing into the Monongahela River.

The COURT. Right. So, what we will do, we will let them see these but not ask any questions about any part of them except those matters referred to in the indictment.

Mr. THORNBURGH. Let me clear up one matter that Mr. Gondelman specifically mentioned, the pH and alkalinity that relates to whether or not it is refuse. The only thing he can

object to is those that can be shown to be more present in river water than they are in samples.

The COURT. Unless they are those things which are relevant in the charge.

Mr. THORNBURGH. We won't ask anything except the ones we indicate—with pH and alkalinity.

The COURT. That you can ask about. Since the rest means nothing to me without the man interpreting, I am sure it won't mean anything to the jury.

Mr. THORNBURGH. I agree. We won't get to those.

The COURT. The jury looking at it, it will mean absolutely nothing to them.

Mr. GONDELMAN. They won't go out with the Jury. You are just going to have the testimony.

The COURT. Let's face that later. Even if it went out with them, they wouldn't mean anything to them.

Mr. GONDELMAN. It would because there are figures. Since they don't know what they mean, it can only help to confuse them if it gets to a Jury.

The COURT. Let's worry about that when that occurs.

Let's bring in the Jury now. We will go until 4:30 p.m.

[In open court.]

Mr. THORNBURGH. Your Honor, I apologize for the delay but, as Your Honor stated, sometime it is easier to wait for these things.

I have marked for identification the agreed upon blowups of the chemical analysis done by Mr. Watts.

Mr. Gondelman and I have no question with respect to the accuracy of the reports.

(Whereupon, Government Exhibit Nos. 7 and 8 were marked for identification.)

The COURT. Are they indicated as exhibits?

Mr. THORNBURGH. They are. I reviewed previously with Mr. Watts the analysis on 230–1, which is now blown up and marked as Government Exhibit No. 7, and Code 511–1, which is now blown up and marked as Government Exhibit No. 8.

The COURT. Is it agreed that those are blowups of the witness' report?

Mr. GONDELMAN. I am sure they are, Your Honor.

Mr. THORNBURGH. We would so represent.

The COURT. All right, fine.

By Mr. THORNBURGH:

Q. Now, Mr. Watts, I refer you in your report, the blowup of which is Exhibit No. 8. That is Code 511–1. That is on Page 37.

A. I have it here.

Q. And that is what has been previously identified as a so-called midstream sample?

A. Right.

Q. And I refer to the pH of 6.4, the alkalinity of 8.0. The concentration is on iron, aluminum, chlorides and total solids and ask if in your opinion that is a representative sample of Monongahela River waters. Was there anything unusual about that sample?

A. Not at that time of the year. I would say that is a representative sample.

Q. Now I would refer you next to the report of 230–1 which is at Page 36 of your report and marked for identification as Government Exhibit No. 7. Do you have that?

A. I have it.

Q. And I would refer you there to the pH of 8.8, the alkalinity of 1070, the iron concentration of .4 parts per million, the aluminum of 40.4, the chloride concentration of 20 and the total concentration of solids at 12,898 parts per million.

The COURT. Before the question is answered, would you offer those exhibits in evidence?

Mr. THORNBURGH. I will offer them in evidence at this time.

The COURT. Mr. Gondelman, any objection?

Mr. GONDELMAN. I have no objection except as to the matters I mentioned to Your Honor before.

The COURT. They will be admitted.

(Whereupon, Government Exhibit Nos. 7 and 8 were received in evidence.)

Mr. GONDELMAN. May I suggest to Your Honor, in view of the type of proceeding we are having, and it is unusual, I would ask Your Honor's leave to cross-examine on these matters at the conclusion of these exhibits. It will get difficult if I have to wait for later.

The COURT. That is reasonable.

Mr. THORNBURGH. Perfectly all right.

Mr. GONDELMAN. Thank you.

By Mr. THORNBURGH:

Q. Referring to those items I mentioned, Mr. Watts, in Government Exhibit No. 7——

A. That is 230-1?

Q. 230-1. I would ask in your opinion what the characteristics of the sample set forth on 230-1 were?

A. All the way down the line?

Q. The sum total of the characteristics, how you would characterize it.

A. Well, getting a pH of 8.8, I would consider that in the industrial waste category, for that high alkalinity of 1070 parts per million.

The hardness is very unusual; with that high pH it is very low.

Iron, it could even come from equipment, let alone the water.

Aluminum is unusually high.

Manganese, that could come from equipment.

Chloride is more than the normal that you would find in the stream.

No phosphate.

Sulfate is normal for a water supply.

Total solids, that is very unusual and very high, 12,898 parts per million.

Volatile solids, evidently due to some of the inorganic salts that are used in the process. Could change from a carbonate to oxide in a burning process.

Fixed solids, 12,145.

Suspended solids, 140. It is rather high, and I would say that the total solids are very high.

The alkalinity is very unusual for an ordinary—even for a water supply or even a municipal waste treatment—going into a municipal waste treatment plant.

Q. How would you characterize the discharge indicated on 230-1?

A. What would I say? What would I call it? I would call it an industrial waste.

Q. Based on the figures set forth on 230-1, would it be possible that this would be the type of discharge that would come from household use, in your experience?

A. Very impossible.

Q. From washing machines, dishwashers and the likes?

A. That's right. Ordinary sewage is what we call municipal waste. We haven't run any BOC here. Solids would probably be in the neighborhood of 500 parts per million overall.

Q. So, in your opinion, it would be impossible that this would be household waste?

A. Strictly impossible with that high total solids.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Mr. Watts, are you familiar with the Water Quality Control Standards in Pennsylvania?

Mr. THORNBURGH. Objection, Your Honor, the question is not relevant.

The COURT. Can I find out what these Water Control Standards are?

I don't know what they are.

Mr. GONDELMAN. He is the expert and knows.

The COURT. What are the Water Control Standards?

By Mr. GONDELMAN:

Q. You know what I mean by Water Quality Control?

A. Right.

Q. What do I mean by it?

A. The State Health Department has set up certain quality standards for all water supplies, industrial waste that are emptied into the streams of the Commonwealth, and the Federal Government is also setting up some standards as well.

Q. You say the State has set them up?

A. The State has and the Federal Government is working with the State Health Department. The Federal Government might even improve them, demand stricter quality standards than the State is.

Mr. THORNBURGH. I would renew my objection and ask that the answer be stricken.

The COURT. I wanted to find out what we are talking about. We have a Federal statute that forbids a certain kind of conduct. That is all we are passing on, and it wouldn't make any difference how the State standards are, whether they are high, low or indifferent.

A municipality could have no standards, and that wouldn't give you the right to throw waste into the river. So, I am going to sustain the objection.

Mr. GONDELMAN. May I take an exception because of some factors. I don't think that is a correct statement of the law.

The COURT. There is a proper place to correct any mistakes that I make.

By Mr. GONDELMAN:

Q. Are there Federal standards for water control, water quality control?

Mr. THORNBURGH. I object on the same basis.

The COURT. What we are concerned with is whether or not there was a deposit from a manufacturing establishment of refuse matter of any kind in these waters. Now, whether that will meet some other kind of standards, we are not concerned with. That is what we are concerned with. We have to keep our eye on the squirrel. We can't go under any other type of paths.

Mr. GONDELMAN. I am not going under any other paths. I am trying to find out what the refuse matter——

The COURT. That you may ask.

Mr. GONDELMAN. I asked about the Federal Government, whether the standards regarding the deposit of refuse matter in a navigable stream of——

The COURT. Go ahead. You want to know what refuse matter means. You can ask him.

Mr. GONDELMAN. My question is whether or not there is a Federal standard defining refuse matter.

The COURT. That defines refuse matter. Is there, sir?

The WITNESS. There is none. That is a broad statement, refuse. They do state that water supplies—that is the United States Public Health Department—that they should not contain any more than 500 parts per million total solids.

By Mr. GONDELMAN:

Q. That is the total supply that the City of Pittsburgh or South Pittsburgh Water gives to the households, that they furnish to the consuming public?

A. The better the raw water supply, the better quality of water they are going to furnish the consumer.

Q. But that is the water coming out. It's that water which goes to the water treatment facility plants.

A. Comes from the river.

Q. The Health Department of the United States has such standards, which you just referred to, which refer to the usage of water; is that correct?

A. For municipal water supplies, 500 parts per million total solids. That is what they recommend.

Q. Municipal water supplies?

A. That's correct.

Q. But I think you have testified that there is no such regulation concerning the discharge into a navigable stream of water?

A. That I do not know.

Q. Incidentally, the matter which was given to you is a quart bottle of material?

A. Unknown material.

Q. When you take that quart bottle of material and test it, you come up with Exhibit 7; is that correct?

A. Right.

Q. Now, do you know of your own knowledge and as an expert whether there is a method by which you should take your findings and convert them into the flow of the stream into which that matter has been deposited?

Mr. THORNBURGH. Objection, Your Honor, not relevant to this proceeding.

The COURT. Well, it's hard for me to rule on that because I don't frankly understand what you are asking about.

Mr. GONDELMAN. It is a simple question, Your Honor.

The COURT. Make it even a little simpler so I can understand it.

Mr. GONDELMAN. We all agree that we don't know much about water control.

Mr. THORNBURGH. I don't think, Your Honor, Mr. Gondelman's remarks are in order. I don't think there is any such agreement at all. I object to that.

The COURT. What we are really concerned with is not any kinds of standards but whether prohibited substances were dumped in the river. That's what we want to know. That's what the Jury——

Mr. GONDELMAN. You can't find that until you find out about the standards.

Mr. THORNBURGH. I object to Mr. Gondelman's testimony.

Mr. GONDELMAN. May I suggest, if Your Honor please, because I don't want to discuss the law across the room, can we adjourn and discuss what the law is so I can ask questions as to what I think is relevant?

The COURT. You ask the questions and, if Mr. Thornburgh objects, I will rule.

By Mr. GONDELMAN:

Q. Mr. Watts, what I was trying to get to is whether or not you know whether there is any method by which an expert in water and water quality control could take the substance which

is flowing from a pipe, measure that substance and then convert it into what its effect would be in the river? Do you understand that question?

A. I understand it.

Q. Can you answer it?

A. Well, to begin with, you have to know the flow of the river, cubic feet per second. And, secondly, we are still—this is a great age of technology where we have gone to the moon. In other words, you are inferring, why don't we continue treating waste by dilution processes.

Q. No, I am not inferring that at all. I am trying to find out whether you know the method by which the rate of a substance in a river is determined, and you did say you knew it because it does depend, does it not, on the rate of water flow in the river?

A. You have to know the amount of water that is flowing by with the amount of water that you are discharging there to get the parts per million there. And you are speaking, possibly with your case here, in not only parts per million, it would probably be parts per billion.

The COURT. Is there a difference if you put a certain substance in distilled water than if you put it in river water and the result that comes out?

The WITNESS. That all depends on the combination, what you have in the river water and what you don't have in distilled water.

The COURT. Is it affected by how large a substance of water you put something into?

The WITNESS. If you want to call it dilution.

The COURT. If you drop something in Lake Erie, will that have the same effect as if you drop it in the river?

The WITNESS. You have a different condition there. You can say that that is a quiescent body of water, and with the river it is a continuously flowing stream, and that is a condition you have in Lake Erie today.

The COURT. That's the point that I have been trying to get at. Congress has said you can't drop certain things in water, and whether you drop them in Lake Erie or the Monongehela River or Niagara Falls, you are not allowed to do it, I understand, if it is navigable. So, what the standards are I think is irrelevant and that is the way I rule.

Mr. GONDELMAN. I would like again to explain to Your Honor why it isn't because in my honorable opinion it is most relevant.

The COURT. We will recess the Jury until 10:00 tomorrow morning to give you that opportunity.

Mr. GONDELMAN. Thank you, sir.

(Whereupon, at 4:25 p.m., the Jury was recessed until 10:00 a.m., the following day.)

The COURT. I want to get some ground rules first. You look at 1171 of the Code. It provides that nothing that is contained in 1151 through 1175 derogates what is in 407 and 411.

Mr. GONDELMAN. That is what it says.

The COURT. Yes, it does. 1151 and 1175 are matters which we are not concerned in this case. We are concerned with 407. The Supreme Court of the United States has defined refuse as including all foreign substances and pollutants with certain exceptions.

Mr. GONDELMAN. What date did they decide that?

The COURT. 1966.

Mr. GONDELMAN. That is prior to the Water Pollution Control Act that you are now telling me it doesn't apply.

The COURT. Merely for the definition.

Mr. GONDELMAN. Prior to the Act which defines it.

The COURT. Give me the definition of it and tell me where you contend it is defined.

Mr. GONDELMAN. In 1151.

The COURT. That has nothing to do with 407.

Mr. GONDELMAN. If Your Honor has made up his mind so firmly that I cannot argue the fact because what you do not realize at this point, and I would like to suggest to Your Honor, is this.

The COURT. You are arguing your contentions.

Mr. GONDELMAN. I am arguing my view of the law which is the only way this Act will make any sense.

My client is faced with a criminal violation, which I would like to have treated with some degree of resolve of the various acts which confront an industrial concern in the United States in 1971.

The COURT. I told you my present thinking. If you can change it, go ahead.

Mr. GONDELMAN. Now, in 1151 through 1174 or 1175, you will find that Congress has set up a system which did not exist before this which it states certification is required.

The Federal Register, which I referred Your Honor to, sets up a system whereby an industrial concern can now for the

first time in its life secure a permit. It could not do this before. But, under the law as it existed when this information was filed, the law in this country is that before you can now get a Federal permit, which you still can't get because they don't have them set up you must get State certification. The State certification sets up standards in the United States in navigable waters which in the Monongahela River have been adopted by the Federal Government.

What Your Honor is saying to me is that despite the fact that the Federal Government has adopted, not just State standards—in a couple of cases these were State standards, but now in the Act of 1970 the Federal Government says we will cooperate with the State and the State may set up the State standards that we will adopt if they meet our standards, and they have so done in the case of the Monongahela River.

So, we now know what the Federal Government considers to be refuse matters in the Monongahela River.

The COURT. Insofar as getting a permit.

Mr. GONDELMAN. Insofar as refuse matter is concerned.

What Your Honor is saying——

The COURT. I am saying that I don't agree.

Mr. GONDELMAN. You will define refuse matter getting a permit contrary to defining refuse matter defined in 407, but the fact that the same permit refers to the refuse matter——

The COURT. That is your contention.

Mr. GONDELMAN. That is part of my contention.

The COURT. What does Mr. Thornburgh have to say?

Mr. THORNBURGH. It is a simple matter of looking at the two Acts and their harmony. One is a Water Pollution Control Act which has to do with water quality standards, a joint or mutual effort on the part of the Federal, State and Local Governments to devise a water pollution control act.

The Act that we have been talking about has been on the books. It is a refuse act. It has to do with the discharge of refuse, and the sole question which the Act of 1899 addresses itself to is whether or not there is a deposit of refuse in a navigable water of the United States.

As the Court pointed out in the United States Steel case in the Northern District of Indiana, which is attached as a copy to our trial memorandum and as we dealt in the Interlake Steel Corporation in the Northern District of Illinois, that this harmony can be established and must be particular because the

Water Pollution Control Act in 1151 said that this chapter shall not be construed as affecting or impairing the provisions of Section 407. That is, the Refuse Act which was on the books then remains on the books today and remains unaffected under any—

The COURT. What you are saying is that 407 must be interpreted in the light of the Act of 1970?

Mr. GONDELMAN. I further say this: A holding by this Court that in effect the deposit of anything that somebody thinks is refuse without any standard or definition of refuse is a violation of the law without any up until 1971, July 1, which is when we have, incidentally, to comply with the law under 407 by the Federal Register.

The COURT. That is a different point.

Mr. THORNBURGH. Let me get to the question of standards. There is an absolute standard in the Supreme Court of the United States in the United States versus Standard Oil where they gave refuse——

The COURT. That is the 1966 case that I was referring to. That is the one I have here.

Mr. THORNBURGH. That's right. It was commercially valuable high octane fuel that was being discharged, and it is made clear by the language of that case that the term refuse matter is to be given a very broad meaning.

The COURT. Let me ask you something. You don't expect the jury to pass on these kind of questions?

Mr. GONDELMAN. I was willing to go on a non-jury a long time ago.

Mr. THORNBURGH. We accepted the Jury under proper instructions.

The COURT. They can't reach those kind of rulings. The only thing they are going to be able to decide is the factual issues, whether or not certain things were put in the river by this Defendant. The rest of these things——

Mr. THORNBURGH. I don't know what issues there are remaining in this case.

The COURT. I am having trouble understanding since you have conceded everything. You conceded that these things get into the river.

Mr. GONDELMAN. Of course. What I am saying, Your Honor, is that what was put in the river is not refuse, and a Jury in this courtroom is not going to be able to so find.

The COURT. They are not going to be able to compare the 1970 Act with the old Act. That is a legal problem.

Mr. GONDELMAN. There is a legal question of whether we should be here at all in light of the Federal Register Regulation put out by the United States of America and which has now said, in light of the Court's opinion, that we have until July 1, 1971 to get a permit.

The COURT. We are not going to that point. We are not there now. Right now what I am concerned with is whether or not the standards adopted by the Commonwealth of Pennsylvania or the Federal Government, if there are any—I don't know whether there are any—whether they have anything to do with the Refuse Act.

Mr. GONDELMAN. My contention, if I may say it, Your Honor, is that it has to because—let me demonstrate the absurdity of this. If we proceed for a permit, not under 411 or 419 or 407 even because you say we are going to take the standards on an act which has no application to 407, we are going to the Act of 1970. Look how absurd that is. We go to that Act and find that the Federal Government has said we adopt the State of Pennsylvania's Stream Pollution Control Standards.

The COURT. For a different purpose.

Mr. GONDELMAN. That is exactly the point.

We then go, under the Act of 1970, and we get a permit. And then we are indicted under the Act of 1899 because what is said under the Act of 1970 doesn't define refuse under the Act of 1899, and you are guilty of violating a law of the United States of America which another agency says you are——

Mr. THORNBURGH. I would rather talk about the facts of this case than a hypothetical.

The COURT. I understand your contentions. I think I understand the Government's contentions. We are in recess until tomorrow morning which will give me a chance to think this over.

Mr. GONDELMAN. May I just bring the facts to Your Honor why I think it is so important that the matters which this Defendant is charged with dumping in the Monongahela River are within the standards of Article 301 of the Pennsylvania Quality Control Standards.

The COURT. That makes no difference to me whatsoever. I am firmly convinced that makes no difference.

Mr. GONDELMAN. Article 301 of the Pennsylvania Standards has been adopted by the United States Government in April of 1970. Therefore, ——

The COURT. That is the problem that I want to check out.

Mr. GONDELMAN. But I have to demonstrate to you why I am willing to admit everything here because, in fact, what we are admitting is that what we are placing in the Monongahela River complies with—you have to understand this too. You cannot get a Federal permit without a State certification.

The COURT. The question is, without a permit, can you do it? If the Federal Government passes a law that you cannot blow bubbles out of a bubble pipe, the fact that 13 states say you can doesn't make a bit of difference. And, also, if there are no permits, you cannot do it either.

Mr. GONDELMAN. That may not be true. That part may not be true because, when you get to the fact that there is no permit, when you get to the fact that nobody ever implemented—the Government of the United States itself didn't implement permits—you then get into the criminal intent.

The COURT. The narcotics legislation says it is unlawful to have heroin unless it is legally imported in the United States, and it is not legally imported. So, your argument is that it is perfectly all right to have heroin because you can't get legal heroin.

Mr. GONDELMAN. Of course not. It is very easy if you don't get into narcotics.

What I am talking about is whether this country could have won World War II in the stupid interpretation of this Act because in this case not one industrial concern in the United States of America could have operated and made the equipment necessary to win a war.

And now, 30 years later, they suddenly find an act and——

Mr. THORNBURGH. On behalf of the Justice Department, may I point out that his interpretation is made——

The COURT. The Jury is not in the box, and how we won World War II has nothing to do with it. I don't pass the laws.

Mr. GONDELMAN. You have to interpret them.

The COURT. That you should address to Congress.

Mr. GONDELMAN. You must interpret the law with some sense of what it has been doing for 72 years, how it has been applied for 72 years, what the Corps of Engineers thought for

72 years, before you can convict a Defendant of intentionally violating that law.

The COURT. You know, when I was with the Government, I thought a lot of things, and we did things on that basis, and now the Supreme Court says you are wrong, you are not going to do them. So, now all those things change. You know a lot of people were convicted of crimes on confessions. And today the Supreme Court doesn't say we have been listening for 150 years, therefore, we are going to go on listening. They are not.

Whatever somebody did in the past, I don't know. I only have this case in front of me with this statute.

Mr. GONDELMAN. Has Your Honor read the Federal Register?

The COURT. No.

Mr. GONDELMAN. You must read the Federal Register before you understand because I am not saying not only the Corps of Engineers, the President of the United States——

The COURT. You have proper opportunity to present it to me and I will read it.

Mr. GONDELMAN. The Federal Register?

The COURT. Sure. Aren't you going to put it in evidence?

Mr. GONDELMAN. I think you should have it right now. I have cited it in my brief.

The COURT. We are going to take into consideration everything you read, but I am not going to decide this case. We are not going to waive the flag. We are not going to talk about World War II. If it has that effect, then Congress I am sure in its wisdom will change the law.

Mr. GONDELMAN. Congress has by giving you standards and not of that absurd effect.

The COURT. You don't help your argument by referring to Mr. Thornburgh's argument as absurd. That is name calling.

Mr. GONDELMAN. I am not calling him names.

The COURT. No, you are calling his argument names.

Mr. GONDELMAN. The fact is, if you are going to interpret this Act in any sense of understanding why Congress passed an Act of 1970——

The COURT. I am going to certainly try to.

Mr. GONDELMAN. The only way you can do it is by having the standard in the subsequent act be the standard of refuse matter being deposited. Otherwise you can't get a permit.

Mr. THORNBURGH. May I raise one point? Mr. Gondelman makes frequent reference to the inability of his client to get a

permit. And I would press on Your Honor at this time—it is the first time I have had a chance to press it—the fact that 407 requires that before a discharge is made that a permit be applied for. It is not even suggested here that his client before this discharge occurred applied for a permit.

The COURT. There was no place to apply. It makes no difference.

I recall, when I was in the Republic of Bolivia, it came to my attention that you couldn't carry a cigarette lighter without a license. So, I went to wherever it was that you went to get a license, and they said that they haven't had licenses for years and they confiscated it.

Mr. GONDELMAN. That is why I am glad I live in the United States of America. We don't interpret that way. Maybe Bolivia has a better standard. I don't like the Bolivian standard, and we ought to use the Democratic process.

The COURT. The Democratic process, as I understand it, is to interpret the laws. However, I have heard your contentions and the Government's contentions. We will rule on it tomorrow morning, and I hope I am right in whatever way I rule. If I am wrong, as you well know, there is another tribunal that can correct anything I do.

Mr. GONDELMAN. That is not a place to go, but, if you are wrong, of course I have my rights, but I would like it to be right here and get rid of this case here.

The COURT. We are going to try to and try to do it in the way we see it is right.

Of course, there are two different views and somebody is not going to agree with me in whichever way I rule.

(Whereupon, at 4:40 p.m., Court was recessed until Friday, June 25, 1971, at 10:00 a.m.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of my stenotype notes of the proceedings held before the Honorable Hubert I. Teitelbaum and a Jury on June 24, 1971.

VIRGINIA T. BENGEL,
Reporter.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

In the United States District Court for the Western District of Pennsylvania

Criminal Action No. 71–75

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, DEFENDANT

Pittsburgh, Pennsylvania, June 25, 28 and 29, 1971

Before: Hon. HUBERT I. TEITELBAUM, J., and a Jury.

APPEARANCES

For the Plaintiff: Richard L. Thornburgh, United States Attorney, and James Seif, Assistant United States Attorney.
For the Defendant: Harold Gondelman, Esq.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

Proceedings

The COURT. Gentlemen, I have now given consideration, of course, to the contention that the Federal Water Pollution Control Act as amended affects the definition of refuse under the Refuse Act of 1899. I have considered the Act of 1948, which is the Federal Water Pollution Control Act as amended as late as 1970, and in my opinion there is no question at all that the standards adopted by the Commonwealth of Pennsylvania, whether or not they have been approved and adopted by the Secretary of Interior, are totally irrelevant, and I will therefore sustain the objection of the Government and will not permit any further questions about it, and I don't want any

further argument on the subject. We have read the acts. There are two other Federal Court decisions deciding this exactly that way. There are no decisions at all sustaining the position of the Defendants. I am going to follow the decision of the Northern District of Indiana in U.S. versus U.S. Steel, and the Northern District of Illinois in U.S. versus Illinois, which considered this very problem and decided it this way.

Mr. GONDELMAN. I just want to ask Your Honor if you have also considered then the Federal Register and the——

The COURT. I have.

Mr. GONDELMAN (continuing). And the fact that the Government by its agencies subsequent to those acts has, in fact, stated that the Federal Government itself recognizes the primacy of the states in establishing water quality standards.

The COURT. Yes, but they also state that the Corps of Engineers can deny a permit even if the water control standards are met. They say that specifically by regulation. No person can assume for himself that, absent a permit, he can pollute the water. Whether it complies with the state standards or not the Corps of Engineers could turn him down anyway, so he can't just go ahead and do it without a permit. Furthermore, these companies have now applied for a permit, so we are not talking about winning World War III. That is my ruling. I am not prepared to listen to any further argument on it.

Bring in the jury.

(Jury returned to the courtroom.)

The Court. Ladies and gentlemen of the jury, you will recall that when we recessed last night we did so to consider whether or not the provisions of the water standards as adopted by the Commonwealth of Pennsylvania are relevant in your decision as to whether or not a person is guilty of a criminal offense under the Refuse Act of 1899. I have ruled, after giving it overnight consideration, that those standards are totally irrelevant to anything we have before us here, so if you heard anything about those, just completely eliminate that from your mind as to what is provided by the water standards of the Commonwealth of Pennsylvania and whether or not they have been adopted by the Commonwealth of Pennsylvania. That is totally irrelevant since if there was no permit as set up in the Act that we are concerned with, Section 407 of the Refuse Act of 1899, if there was no permit it is a violation if there was refuse deposited in the navigable waters, so you don't have to concern

yourselves at all with what is in the Pennsylvania Water Standards Act provisions or Federal provisions, if there are any.

MICHAEL R. WATTS, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. As I understand you, you have your reports which are Exhibit 7 and Exhibit 8 in front of you. Is that right?

A. Exhibits 7 and 8. In number, what would they be? 230–1?

Q. That's Exhibit 7.

A. And 511–1?

Q. That's Exhibit 8. All right. Now, on those exhibits I was asking you whether in connection with Exhibit 7 the matter which you had was, first of all, in a liquid state. Was it not?

A. You are speaking of 230–1?

Q. Yes, sir.

A. It was in a liquid state.

The COURT. May I ask in this regard, were the metal deposits that you have talked about, the solid deposits, were they suspended——

The WITNESS. They were suspended matter in the liquid sample that was submitted to us in the lab.

The COURT. But they themselves, those solids, were they liquid or solid?

The WITNESS. Well, that would be solid, suspended.

By Mr. GONDELMAN:

Q. As used in water expertise, when you refer to the content of the bottle that you received, I again say, it was in a liquid state, was it not?

A. We speak of it that way. If you shake the bottle up there may be some suspended matter in the liquid.

Q. And there also may be some dissolved matter within the liquids which, if you go through your process of getting rid of the liquid, you would then get to crystals and other matters?

A. Right.

The COURT. That was the point of my question. I want to know whether it was dissolved or suspended.

By Mr. GONDELMAN:

Q. There were both, were there not?

A. Correct, both.

Q. But the fact is, it was still in your expertise jargon, in

the language that you experts use, the matter was in a liquid state. Is that correct?

A. Right.

Q. When you show on your Exhibit 230–1, aluminum, are you talking about aluminum as we know it on a door or on a building, as a metal, or are you talking in terms of that aluminum being a salt?

A. Aluminum hydroxide, being an insoluble suspended matter which is converted to aluminum in my report.

Q. When you say it was aluminum hydroxide, could you tell whether it was also aluminum, what, chloride or hydrochloride?

A. There could be a possibility that it could be a chloride in there.

Q. So then the aluminum that you found might have come from an aluminum chloride?

A. There is a possibility.

Q. Or it might have been an aluminum sulphate?

A. Sulphate, correct.

Q. And it is a fact, is it not, sir, that aluminum in the hydrochloride or in the sulphate state is used by water treatment plants in processing their water; if you know?

A. True.

Q. In other words, in the purification of water we use aluminum chloride or aluminum sulphate?

A. Correct. However, I could add something to that statement, that if you use aluminum or aluminum chloride or aluminum sulphate in water treatment, you wouldn't end up with a product of 40.4 parts of aluminum in the potable water that you are supplying the people.

Q. How about 1.1?

A. There is a possibility of getting it 1.1, but not 40.4.

Q. When we take the 40.4, you are talking about 40.4 as you have it in its form in the quart bottle that was given to you. Is that right?

A. Right.

Q. And in order to determine the effect of that 40.4 as it is deposited into the Monongahela River, you would have to know the rate of the water flow and the amount of water into which that aluminum chloride or sulphate was going into?

Mr. THORNBURGH. Objection, Your Honor. It is irrelevant.

The COURT. Let's hear the answer.

A. Naturally there would be some deposit.

By Mr. GONDELMAN:

Q. I don't think the answer is responsive, or maybe my question was confusing.

The COURT. Restate your question.

Q. When you have the 40.4 of aluminum as you got it in this bottle which came from a pipe, if that were then permitted to flow into the Monongahela River, in order to determine its effect in the Monongahela River and its then percentage content in the river you would have to know the amount of water in the river and the rate of flow in the river and other factors, would you not?

Mr. THORNBURGH. I renew my objection, Your Honor.

The COURT. Yes. Sustained.

Mr. GONDELMAN. If the Court please, there is a comparison of what was in the river——

The COURT. I am concerned with what was in the water that was put in the river, not with the effect of it after it got—that's the same thing as the water standards that you are talking about, and I have ruled on it.

Mr. GONDELMAN. No, it is not. I have asked whether or not——

The COURT. You may be right, but I have sustained the objection. Proceed to something else.

By Mr. GONDELMAN:

Q. Incidentally, as you look at 511–1 and 230–1, the Government has charged this Defendant with discharging into the river iron. Would you tell me if you, in your expert opinion, would consider the pure analysis of iron at 0.4 at 230–1—where in the midstream at 511–1 that is 0.1—would you consider the addition of 0.3 iron as being a large amount of iron or any amount of iron at all?

Mr. THORNBURGH. Objection, Your Honor. The question as to the large amount of iron is not within the purview of these charges. The question is whether any iron is deposited.

Mr. GONDELMAN. I would, of course, except to that because we have got to get to the point—

The COURT. Well, that may have some relevance, so we will go ahead.

A. No. I would consider that 0.4 could come from processing the material at that plant, from equipment, wear and tear of equipment, so that is a very small amount. However, in making an analysis of iron and aluminum it is a double process. There-

fore while we are looking for aluminum we pick up and determine iron at the same time.

The COURT. Could that iron get in there through any other source except from this Defendant?

The WITNESS. Oh, yes, this is a possibility. To begin with, this 511–1 was collected above the source of the discharge.

By Mr. GONDELMAN:

Q. And in your direct testimony you found that not to be high and you weren't particularly concerned with it.

A. That's right.

Mr. THORNBURGH. Objection.

The COURT. Yes, but he said it came from above the source of the discharge, so why are we concerned with it?

Mr. GONDELMAN. I am concerned with it because the Defendant is charged with violating the law by putting it in the stream and I want to move to correct this information.

The COURT. This witness is not going to testify as to whether or not the law was violated. That is a question for the jury. The testimony right now is the sample of the iron came from above the point of the discharge. At the appropriate time you can argue it. Whether it is a whole lot or a little bit doesn't make any difference. It came in before the point of discharge, was there before the point of discharge.

As to sulphate, Mr. Watts, you found that 262 was normal. That was your direct testimony, I believe; did you not?

A. I believe.

Q. So that as to sulphate 262, you did say in your direct testimony when Mr. Thornburgh asked a question that it was normal.

Mr. THORNBURGH. I object to this question, Your Honor. Discharging sulphate is not charged here.

Mr. GONDELMAN. He was asked about it on direct examination.

The COURT. Answer the question. I can't recall whether he was or wasn't. We will let him answer it.

A. That amount in 230–1, 262, and in 511–1, 267, I have nothing to quarrel with there. That's a normal discharge that you would find in the stream as well as in the waste that we are speaking of here, in that particular sample.

The COURT. And sulphates, of course, are not a part of the charge. There was a normal amount of sulphate.

Mr. GONDELMAN. I realize that, Your Honor. That was part of his direct testimony.

The COURT. All right.

Q. In fact, in the sample which you examined there was less sulphate being discharged into the stream than is shown in your Exhibit 511–1. Is that correct?

A. Correct. However, in my testimony I also mentioned that I wasn't concerned too much with the sulphate. I was concerned with the high pH and the high alkalinity and the high total solids.

Q. We know what you're concerned with, but the fact is you still ran an expert test with a desire to be accurate, did you not?

A. Right.

Q. So you were accurate in your finding of sulphate at 262.0 in 230–1 and you were accurate in the finding that in midstream there is 267.0 in your Exhibit 511–1. Is that correct?

Mr. THORNBURGH. I don't see any relevance to the examination as to sulphates. It isn't charged in the information, Your Honor.

The COURT. We are going to let him go ahead with it.

Mr. GONDELMAN. He asked about it, I think.

The COURT. All right. You know if you argue after I make a ruling, I reserve the right to change it.

Q. Then it is correct, is it not, that there is more sulphate in midstream than there was discharged into the river?

A. According to the analysis.

Q. And it was your analysis?

A. Right.

Q. And it is accurate?

A. Yes, sir.

Q. Your testimony as to 230–1, that is, those figures relate to pounds per million. Is that correct?

A. Per million pounds of water.

Q. In other words, it is per million pounds of whatever you found on the exhibit as relating to per million pounds of water?

A. Right, or if you want to convert it into millions of gallons or per million gallons of water, one part per million is equivalent to 8.34 pounds per million gallons of water.

Mr. GONDELMAN. That's all.

The COURT. Mr. Thornburgh, do you want to go ahead with the rest of your direct?

Mr. THORNBURGH. Can I ask a couple of questions with respect to redirect?

The COURT. Sure, you can.

REDIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Watts, you refer to these samples having been received in a liquid state. Have you ever received any samples for water analysis in other than a liquid state?

A. Well, would you call it semi-liquid—some of the flocculent material, half of it might be settled out and the other half is in a liquid state.

Q. Well, you have never received anything in a solid or gaseous state for water analysis, have you?

A. No.

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. I am going to refer next, Mr. Watts, to Government's Exhibit No. 9 which is sample 231–1 on page thirty-six of your report.

The COURT. Will you offer it in evidence.

Mr. THORNBURGH. I will at this time offer Government Exhibit 9 into evidence.

The COURT. Any objection?

Mr. GONDELMAN. Same objection.

The COURT. Same ruling. It is admitted.

(Whereunpon, Government Exhibit No. 9 was admitted into evidence.)

Q. Mr. Watts, what I am referring you to is Government Exhibit No. 9, being code No. 231–1, already identified as having been collected at the source of discharge on August 7, 1970. That is the second sample that was obtained on August 7, 1970. I wonder if you would review the results of the tests made on sample 231–1 for the jury with respect to pH.

A. Well, we found sort of a normal pH of 7.6 which you would find in natural waters. The alkalinity, however, was very unusual, very high, 8,200 parts per million. We will go on down to hardness. Hardness is 0. Looking at that figure and that alkalinity, one would assume that there was some sort of a sodium or potassium salt used in the process somewhere that ends up in this industrial waste. Iron, 1.4 parts per million. That's a little higher than in the previous one, but nevertheless, that's a small amount. It takes at least seven parts or eight parts of iron before you will notice color. In other words, you will get a tan color with at least seven parts of dissolved iron. Aluminum is still pretty high, indicating that there is probably some aluminum

chemical being used in the process, or it could come from aluminum equipment being used.

Q. What is that figure, Mr. Watts?

A. 41.8.

Q. Skip the next one.

A. Manganese is 0, chloride is 36. That would indicate there has been some chloride, chloride radical, say, aluminum chloride used in the process because the figure is up to 36 parts per million. There is some phosphate. Phosphate salt has probably been used. Maybe part of its use is in boiler water treatment which in a blowdown would be blown into the natural waste water discharging from a plant. The sulphate is very high, very unusual. That would indicate there is a sulphate radical, that sulphuric acid has been used somewhere in that process.

Q. What is that number, Mr. Watts?

A. 3,206 parts per million. The cyanide is 0. The total solids are 28,782, the volatile solids are 3,374 parts per million. Your fixed solids, 25,408 parts per million. Suspended solids are 110 parts per million.

Q. Mr. Watts, looking at Government's Exhibit No. 9, code No. 231–1, as an expert how would you characterize that sample?

A. Strictly an industrial waste.

Q. What is of particular significance among the results set forth on Government's Exhibit No. 9?

A. Well, the major one is the very high alkalinity of 8,200 parts, aluminum is unusually high, chloride, sulphate particularly, very high, and you end up with all that tremendous high amount of solids. It was all solids, total solids.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. But some of those solids have been picked up if this sample were taken as this liquid moved over rocks or floated over rocks.

A. It is very doubtful. From day in and day out you are having the scouring effect on those rocks anyway, and whether your consultant would pick them up or I would pick them up, that is something we wouldn't argue. It is strictly an ordinary industrial waste being discharged that we would pick up.

Q. As I understand it, you found since there was 0.7 phosphate in the sample it indicated to you that there must have

been a discharge in the industrial process of some chemical containing phosphate. Is that right?

A. True.

Q. Because otherwise you would not find 0.7 phosphate in the sample which you examined?

A. That's right.

Q. Would you take a look at 511–1, sir. Is it not true, sir, that the midstream sample taken above the plant of the Defendant, where I think you testified before that it did not contain the matters discharged from the Defendant's plant, that the phosphate content of that sample was 0.8?

Mr. THORNBURGH. Your Honor, the Government hasn't charged any discharge of phosphates in this count. The question is irrelevant.

Mr. GONDELMAN. The Government deleted phosphates, but the witness testified about it on direct, and he also said that he would take it that the phosphates came from boiler water treatment.

The COURT. We are only concerned with the charge before the jury, and that does not include phosphates. However, if it serves any purpose as to the credibility of the witness, the expertise of the witness, you may ask it, if you are attacking Mr. Watts' credibility.

Mr. GONDELMAN. That question directly goes to credibility.

The COURT. I thought you had stipulated as to expertise, but I will let you go ahead and question his credibility, if you want.

Mr. GONDELMAN. But I didn't stipulate that everything he said was accurate.

The COURT. Of course not, and you may attack his credibility in any way you see fit.

By Mr. GONDELMAN:

Q. The question to you, sir, is whether or not the midstream sample, 511–1, shows phosphate 0.8. Is that correct?

A. Right.

Q. So that you are mistaken in your assumption that the 0.7 in 231–1 came from a chemical which was used then in an industrial process since there was more of the phosphate in midstream?

A. As I mentioned, phosphates are used in boiler treatment. You might have discharged some there, and as far as 0.8, I

don't know where it came from that we found in the river, and that was above your point of discharge to begin with.

Q. Right, that 0.8 was in the river above the point of discharge.

A. Right.

Q. And at the point of discharge it is 0.7.

Mr. THORNBURGH. Objection, Your Honor. That is not what the testimony was. It was what is in the discharge, not what was in the river at that point.

The COURT. We have an expert. I am sure he can clear that up.

(Preceding question was read.)

The COURT. You may answer.

A. I'm just giving you what I found in that particular sample and I don't consider it very important, considering the other high amounts of alkalinity, total solids and the other that I mentioned sulphates.

Q. In fact, you don't consider the iron very important either, do you?

A. In this case, no, not in this sample.

The COURT. Would .7 or .8 sulphate be found in natural water?

The WITNESS. Phosphate.

The COURT. Would either of the figures—

The WITNESS. There is a possibility because you not only have that coming from detergents, you have that coming from fertilizers, so it all depends on what time of the year you collect the sample. After a run-off, yes, the phosphates in the stream would be higher.

Q. And again, aluminum. Aluminum chloride or sulphate is used in the water treatment plants for the purification of water, is it not?

A. Correct.

Mr. GONDELMAN. I have no further questions.

A. But I stipulated also that you would not supply the ordinary citizen with treated potable water with 41.8 parts of aluminum for aesthetic reasons. You would have something floating around in there and the housewife would look at it and say, "Something is the matter with the water."

Q. I didn't say coming out of the tap. I said in the water treatment plant aluminum is used for the purification of water.

A. Oh, yes, it is used. So is ferric chloride used. So is phosphate used in treatment of water, treatment of boiler water.

REDIRECT EXAMINATION

By Mr. THORNBURGH:

Q. If you were called upon to assess a sample taken from a water purification plant and that sample analysis produced the results that are set forth on 231–1, which is Exhibit No. 9. what would your reaction be?

Mr. GONDELMAN. The question is objected to because there is nothing in the Refuse Act that says water has to be coming from a water treatment plant.

Mr. THORNBURGH. Mr. Gondelman has raised the possibility that this is the kind of water that comes out of a water purification plant.

Mr. GONDELMAN. That is not what Mr. Watts is saying. Mr. Watts is saying the chemical is used in the treatment of water.

The COURT. Let it go to the jury. Both of you can argue as you see fit.

A. Well, I certainly wouldn't approve of water containing 41.8 parts per million in a sample of tap water being furnished to the public.

Q. How about one that had total solids of 28,782?

A. Never. That is an impossibility for potable water to have that.

The COURT. How about normal water just without anybody dumping anything into it? Would you find that much?

The WITNESS. Never, Your Honor.

Q. What would you normally find?

A. Ordinary tap water or river water?

Q. River water.

A. It all depends upon the time of the season, the area that you are collecting the sample in. In a mine drainage area during the summer months when you don't have much of a run-off, you can go up to 500 parts per million total solids.

Q. That would be as high as it would go?

A. That's right.

Mr. THORNBURGH. I have no further questions on this exhibit.

RECROSS-EXAMINATION

By Mr. GONDELMAN:

Q. In light of those questions, Mr. Watts, you say that you would ordinarily find 500 parts of solids in ordinary river water. Is that correct?

A. At certain times of the year.

Q. Coming to your exhibit 231–1, in order to find what that discharge would do in a particular river like the Monongahela, you would have to know the rate of flow and the amount of gallons in the Monongahela River, would you not?

A. That's correct.

Q. So that the discharge of the solids that are shown on 231–1 into the Monongahela River, with its rate of flow and with the natural dispersion that would take place could well take that amount of solids down to the 500 that you have mentioned ordinarily would be found in river water, or do you know?

Mr. THORNBURGH. Objection. We are again into the quality of the river and it is not relevant.

The COURT. Sustained.

Mr. GONDELMAN. May we see Your Honor at side bar?

The COURT. No.

Mr. GONDELMAN. Your Honor asked a question that led to this line of questioning.

The COURT. You can object to my questions.

Mr. GONDELMAN. I can't object to your questions. You rule on it.

Do I understand I cannot find out what would happen to the discharge in the river to determine what the normal river solids would be?

The COURT. I am concerned, and the jury is concerned, with whether anybody was dumping solids into the river or industrial waste into the river. Whether they dumped enough to pollute the whole river isn't our question.

Mr. GONDELMAN. I have no further questions.

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Next, Mr. Watts, I would like to refer you to what has been identified as Government's Exhibits Nos. 10 and 11.

Mr. THORNBURGH. I offer into evidence at this time Government's Exhibit No. 10, being the code sample identified as 230–2.

The COURT. That is count number what?

Mr. THORNBURGH. That is count number two.

The COURT. Any objection, Mr. Gondelman?

Mr. GONDELMAN. Same objection.

The COURT. No additional objection? The exhibit is admitted.

(Whereupon Government's Exhibit No. 10 was admitted into evidence.)

Mr. THORNBURGH. And also Government's Exhibit No. 11, which is identified as code No. 511–2. That is the midstream sample taken on August 19, 1970.

Mr. GONDELMAN. Same objection.

The COURT. It is admitted.

(Whereupon Government's Exhibit No. 11 was admitted into evidence.)

Q. Let's get our signals straight here, Mr. Watts. I am referring to Government's Exhibit No. 10, the sample designated as 230–2, page fifty-three of your report. Government's Exhibit 511–2 is on page fifty-four of your report.

A. Right.

Q. Let's look at 511–2, which is Government's Exhibit No. 11, being the midstream sample taken on August 19, 1970. I wonder if you would just review for the jury those findings and your analysis with respect to that one.

A. On 511–2 you will notice that the pH range is 5.6. That is in the acid range. We are assuming that we have some acidity in there. The alkalinity only amounts to 4 parts per million. You come down to total acidity, down to the iron, aluminum salts which hydrolyze there and gives you 12 parts per million, so your alkaline reserve there is only 4 and you have 12 of acid. Hardness is 180 parts per million. There is no iron, 0. Aluminum is 4.8 due to those hydrolyzable salts of aluminum. Manganese is 1.0, a good indication that there is mine drainage in there. Chloride is 8 parts per million. That is low. Phosphate is one-tenth of a part per million. Sulphate is 258.4 parts per million. There is no cyanide. The total solids is 404 parts per million. The volatile solids, 87, and fixed solids, 317 parts per million.

Q. Mr. Watts, I wonder if I could ask you just for a moment to step down from the stand. Displayed in front of the jury side by side are Government's Exhibits No. 8 and No. 11, being the two midstream samples. I wonder if you would examine those two midstream samples and let me ask you some questions about that. Would you, in your expert opinion, character-

ize each of those as—how would you characterize them? Are they typical or atypical water samples?

A. Comparing the two, the one has a pH of 5.6 and the other one a pH of 6.4. This would indicate to me that in this sample here we have got an unusual flow of mine drainage from some area where you have run-off. If it is on the Monongahela, it comes down from the Maryland mining area or West Virginia. To prove that you have to go down to, say, Point Marion and check a river that is one of the tributaries that is flowing into the Monongahela to see which one it is and you would probably pick that up, and the difference is the pH since the pH is lower here and a little higher there. You'll notice as the pH drops your alkalinity goes, so if I have a pH of 4.4 I would have no alkalinity. There would be zero alkalinity in the stream. In other words, that is not very good for a body of water to have 0 alkalinity. I mentioned in the one where we had a pH of 5.6 and an alkalinity of 4, compare that with a pH of 6.4—

Q. On the midstream samples only we are talking about.

A. These two here. You will notice I didn't list any bicarbonate alkalinity which we would normally find for the simple reason we are getting total acidity. It seems odd to a person that you can have alkalinity and acidity at the same time. The pH governs that. We know there is no free mineral acid in the pH because your pH would be 4.4 or less, but this pH dropping in both cases indicates that we have some hydrolyzable solids that has a tendency, when it is dissolved in the water, to turn it slightly on the acid side, so your pH will drop there. The hardness is 180 against 164. You will notice that the hardness is increased here for the simple reason that you have an acid condition of water that is flowing over the rocks dissolving the shale, the limestone and so on, picking up the calcium and magnesium that increases the hardness. Notice the pH is 5.6. There you have 180. Here it is 6.4 and you have 164. The total iron is 0 here and .1 here. You have a little more aluminum here, 4.8. That is 1.1. We don't have any fluorides here, but you will notice as your water is more acid you will have more fluorides in the water.

Q. There is no fluoride? You didn't find any fluoride?

A. No, but I just mentioned that. The solvent action of the water on an acid side gives you an idea of the amount that can be dissolved. There is 1 part manganese. That indicates mine drainage. You will find a lot of manganese in mine drainage. In here we only get three-tenths of a part, so this indicates that

we have gotten some mine drainage coming in on that particular day when that sample was taken. You have chloride of 8 there and chloride of 8 there. That's low, normal for ordinary stream water. Phosphate, one-tenth against eight-tenths. There is a strong possibility that some of this phosphate, because of the low pH, would combine with some of the calcium and magnesium that is combined with the water. Therefore you would have a precipitate of calcium phosphate that would settle out. Sulphate, 258 against 267. You will notice that this is a little higher here than it is here. There is a strong possibility that some of this, with incoming alkaline water, could have been settled out, precipitated out, as calcium sulphate or gypsum, so you see the difference in those two. We checked for cyanide. We didn't find any. The reason we check for it, these are all code number samples and we had no idea by the color, appearance of that—we didn't want to miss anything so we ran a check for cyanide in that case. The total solids, 404 against 348. Volatile solids, 87 against 112. This little higher amount could indicate that we have got some organic, possible organic matter. It is a little higher than this one. The fixed solids, 317 to 236, indicating because of this condition there is more dissolved solids. Calcium, magnesium and so on have been dissolved by the water.

Q. A midstream samples of the river, based on your knowledge of that river and your experience in running water analyses, how would you characterize those samples, the one taken August 7 and the one taken August 19?

A. Well, for the different seasons of the year, I would say that that's not abnormally high. That's a normal flow of water. If it should drop, say, a very high flow, a very high discharge, mine drainage, so on, yes, this could drop. I remember thirty, forty years ago both streams here——

Mr. GONDELMAN. Your Honor, let's stay a little closer to the subject.

Q. Mr. Watts, you might as well stay there. Would you take a look at what has been marked for identification purposes, I believe, as Government's Exhibit No. 10.

A. 230–2.

Q. No. 10, 230–2, which is the sample taken from the discharge point identified as No. 230 on August 19, 1970, and review the findings of your sample analysis there and give us the benefit of your observations on it.

A. Well, starting with pH, you have a pH of 4.4. We know we have no alkalinity, as you see here. We have 0 alkalinity. With

that pH of 4.4, if we have 0 alkalinity, we are going to look not so much for 0 acidity. Due to iron, aluminum salts we have it listed as so, 360 parts per million. Hardness is 168 parts. The total iron, 1.2 parts. Here we come to aluminum, 98.4 parts. That is very high. Manganese is 0.8 parts per million. Chloride is 132. That's unusually high. You wouldn't find that in a stream unless it was contaminated. Phosphate, two-tenths of a part per million. Sulphate, 270 parts per million. Cyanide, 0. The solids are very high, 1,068. I mentioned previously in an ordinary stream during a dry spell you would be fortunate if you had 500 parts per million. Volatile solids, 417, with that volatile indicating some organic combustible matter there more so than inorganic chemicals. The fixed solids, 651. Suspended solids are very low, 15 parts.

Q. Based on your review of that sample analysis there, how would you characterize that discharge?

A. I would call that an industrial waste discharge.

Q. What are the particular road signs that you have there that gives you a clue as to what might be happening?

A. My first clue is a pH of 4.4. Then you have total acidity, 360 parts per million. My next clue would be high aluminum, 98 parts. Here is the next one, 132, chlorides. Sulphates, I don't consider that. In this case the chlorides indicate there could have been a possible use of hydrochloric acid in the process there somewhere. The total solids are unusually high.

Mr. THORNBURGH. Cross-examine.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. What you are saying, sir, as to 230–2 is that the iron and the sulphates are within normal limits, are they not?

A. According to that sample there, yes. I wasn't concerned with those two as I was with the others that I mentioned there.

Q. Are the phosphates within normal limits?

A. Yes.

Q. As a matter of fact, in the river itself it was 0.1 in one case and in the one taken out of the sample it was 0.2, so in that one sample it is one point higher than the sample from the river without anything being added by the Defendant.

A. There is a possibility you weren't blowing down from the boiler treatment when the sample was collected.

Q. The other sample that you have from the other day, 231–1, was something like 0.7, was it not?

A. Yes.

Q. And in the sample taken two weeks later it was 0.2.

A. As I mentioned before, you were probably using the phosphate in boiler treatment. One day you were blowing down and we got 0.7. This time you weren't blowing down. It just so happened that we just got a trace of phosphate.

Q. If the water which is taken into the Defendant's plant came from the river sample which you testified came from midstream above the plant, then that river water would have contained on your exhibits in one case 0.1. That is 511–2. It only had 0.1 phosphate. Is that correct?

A. Right.

Q. And that would be the one which, at 230–2, the date of that sample then comes out at 0.2 phosphate, does it not?

A. Right.

Q. And on the date that 511–1 was taken you have 0.8, and the exhibit not up there, 231–1, came out as 0.7. Is that right?

A. There is a possibility that any of your solids may combine with a phosphate. You can have calcium and magnesium combine with a phosphate and come out as a precipitate in your total solids.

Q. Anything can happen.

A. Right.

Q. As far as you can testify as an expert as to what did happen, we know that at the point of discharge, 230–2, it comes out at 0.2, and the stream itself before the water went into the Defendant's plant was 0.1.

A. I consider that as a minor pollutant, if any. My consideration in this case is a very low pH, no alkalinity, total acidity due to the low pH, high aluminum, high chlorides, high total solids.

Q. So you don't consider the phosphates anything or the sulphates anything?

A. In this case, no. If the sulphates were in the 2,700 area, I'd say yes.

Q. But they aren't. They are 270——

A. But in this case, no.

Q. And in this case and from the exhibit from which you are testifying, your testimony as an expert is that it gave you no concern. Is that right?

A. In this case, no.

Q. Just on that exhibit, as to sulphates, you did not consider that a matter of concern. You figured it was really normal in that river water, did you not?

A. Normal in this sample. There was nothing unusual in the sample as far as sulphates are concerned. As I mentioned before, if the sulphates would have been up in the 2,200——

Q. Then we wouldn't be talking about Exhibit 9 or Exhibit 10. We would be talking about something else. Let's try to stick to that exhibit if we can, sir.

A. All right.

Q. You then come down to suspended solids, 15.0. Is that correct?

A. Right, 15 parts per million.

Q. That's 15 parts of solids per million. Would you say, sir, that the sample which you got and tested at 230–2 was in a liquid state?

A. We considered it as a liquid state, yes. We consider syrup as a liquid state, too.

Q. My question again to you is, is the sample which you received and which you have examined, 230–2—I'm not interested in syrup or waffles. I am interested in 230–2. You got that in a bottle, did you not?

A. Right, as a liquid.

Q. Then it was in a liquid state.

A. Right, with a little suspended matter in there of 15 parts per million.

Q. And that would not make it a solid?

A. Correct.

Q. So it would still be in a liquid state.

A. That's right.

Q. That's all I asked you. The iron was no problem, was it?

Mr. THORNBURGH. Your Honor, I object to that kind of a question. I don't know what Mr. Gondelman means.

Q. You didn't consider it high, though? What did you——

A. No. As I mentioned previously, when I got this sample we made the analysis from an industrial waste point of view. When I get a pH of 4.4 I don't have to run anything else. I will say that is an industrial waste that you are dumping into the waters of the Commonwealth.

Q. Well, sir, the Defendant has been charged with dumping iron, in that sample, into the river. You are the expert, so my question now to you is limited to iron and I would like to find

out from you if you can answer specifically without going over the whole exhibit. I am directing you to what is shown on your exhibit as iron, total Fe, 1.2. As to that finding in your test, is that iron unusual, an unusual discharge in the Monongahela River?

Mr. THORNBURGH. Objection, Your Honor. It has no relevancy.

The COURT. That's right. Sustained. Rephrase your question.

Q. Are you concerned about the amount of iron you found in the sample?

Mr. THORNBURGH. Objection; same grounds.

The COURT. Well, what we want to know is whether 1.2 parts would be considered refuse as to iron. Isn't that what we are asking for?

The WITNESS. In other words, that would be 1.2 pounds in a million pounds of water.

The COURT. Is that a significant amount?

The WITNESS. That's very insignificant. I'm concerned here with the type of water, the volume of the water at that pH, the acid condition.

The COURT. But in Mr. Gondelman's cross-examination he doesn't want to ask you about that.

Q. And if I ask you the same question as the Judge just asked you as to manganese, would your answer be the same?

Mr. THORNBURGH. That's irrelevant. We don't charge a discharge of manganese in this count.

Mr. GONDELMAN. You deleted that the same as you did the iron after the case was in trial.

Mr. THORNBURGH. I ask that that be stricken.

The COURT. Well, whether something was deleted or wasn't deleted, we are only concerned with what is still there, so don't speculate as to why it was deleted. It isn't there.

Q. Your answer would be the same as to the sulphates, wouldn't it?

A. It is a low amount. The manganese, we don't like it because even a half a part, even in the treatment of water, in the end you will have black spots on your white linen and so on.

Q. I agreed to withdraw my question as to manganese. I was talking now about sulphate, SO4,270.

A. The 270, we are not concerned with that amount.

Q. Especially when the river itself is 258 and 267 on the other two exhibits.

A. That's pretty close.

Q. When you are talking about that part, in how many millions of gallons of water is that?

A. That is 270 pounds in a million pounds, or if you want to get it in million gallons of water——

Q. Let's just take it there. 270 pounds of sulphate in how much water?

A. In one million pounds of water.

Q. So that in the river upstream it is 258 pounds of sulphate in one million pounds of water?

A. Right.

Q. You are talking about a difference of roughly 14 pounds in a million pounds of water. That's why you don't find it significant?

A. Well, no. I wasn't concerned to find it significant when I get that figure and I get this figure.

Q. Mr. Watts, I can't keep trying your whole exhibit. I would like, if you could—please, I'm trying to direct your attention to one finding on your exhibit.

A. All right. I said 270 wasn't significant when you compare it with what's in the river.

Q. Would you find suspended solids in the amount of 15 pounds per million a significant amount of solids?

A. No, I wouldn't find it significant.

Mr. GONDELMAN. I have no further questions.

REDIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Watts, I want to redirect your attention to Government's Exhibit No. 7, being the code No. 230–1. You have testified on cross-examination with respect to the comparison between those two. Now, 230–1 and 230–2 have already been identified as having been taken from the same source of discharge. What would the fact that the pH was alkaline on 230–1, 8.8, and acidic on 230–2, 4.4, indicate to you as to the type of discharge?

A. Well, in this case, being a low pH, I have got some aluminum salts in there that would drop that pH. I have some chloride which could be some hydrochloric acid there.

Q. Maybe you don't understand my question. Let me put it this way. Is there a difference, in your expert opinion, between the type of discharge that was made on August 7 from this

source, No. 230, and the type of discharge that was made on August 19 from No. 230?

A. Well, in this case here you have a caustic range of discharge.

The COURT. Would you refer to them by exhibit because we won't be able to understand that later.

A. Exhibit No. 7 has a pH of 8.8 and Exhibit No. 10 has a pH of 4.4.

Q. Let me ask you if you will translate that into terms that I and the jury will understand.

A. Yes.

Q. What is that difference?

A. The difference there is that by looking at the pH's in the one case you have an acid range and in the other case you have a caustic range, so evidently in this caustic range there must have been some use of some caustic material such as soda ash, sodium hydroxide. That's on the caustic, the lye side, and would raise this pH.

Q. Would that same kind of caustic material have been included in 230–2, Exhibit 10?

A. It is very doubtful because you have a pH of 4.4 which indicates there is some acidic material instead of alkalitic material.

Q. Are these two discharges from the same spot taken on different dates similar or dissimilar?

A. Dissimilar.

Q. They are dissimilar?

A. Right. They are industrial wastes.

The COURT. Anything further, Mr. Gondelman?

Mr. GONDELMAN. I don't think so.

(Short recess)

Mr. THORNBURGH. I would move the introduction into evidence of Government Exhibit 12, being code No. 231–2, a sample taken from the outfall identified as No. 231 on August 19, 1970.

Mr. GONDELMAN. Same objection.

The COURT. Same ruling. Admitted.

(Whereupon Government Exhibit No. 12 was admitted into evidence.)

The COURT. This concerns, I assume, count four?

Mr. THORNBURGH. This is count four, the final of the four counts, yes.

Q. Referring to Government's Exhibit No. 12, Mr. Watts,

I wonder if you would go through the results of your sample analysis in the same manner as you have the three previous and give the Court and jury the benefit of your analysis.

The COURT. Without repeating conclusions you have already given. You know what I mean.

A. Sample No. 231–2 has a pH of 10, on the caustic range, very high. The alkalinity is 16,000 parts per million, very high. That pH would mean no total acidity. The hardness is 0, iron is 2.2. The aluminum is high again, 83.6. The manganese is 0. Chlorides, 540, high. Phosphate, 10.5, high. Sulphate, 9,768 parts per million, very high. Cyanide, 0. Total solids 46,832 parts per million. Volatile solids, 7,337 parts per million. Fixed solids, 39,495 parts per million, very high. Suspended solids, 320 parts per million, very high.

Q. How would you characterize that?

A. I consider that an industrial waste discharge.

Q. What kinds of clues do you have as to the nature of that?

A. A pH of 10, alkalinity, 16,000.

Q. Let me interrupt you for a minute, Mr. Watts. In each case you have referred to the pH and the alkalinity. They don't indicate the presence or absence of any particular substance, do they?

A. No, except it gives me an idea that this—the pH with that high range of 10 is on the caustic side. It must have some caustic material in there, caustic material of some nature, and this bears out with the high alkalinity of 16,000.

Q. Were there any other clues there that you would want to refer to specifically?

A. Yes. We are back again to high aluminum 83.6. We are high in chlorides, 540. We are high in phosphates in this case. We are high in sulphates. We are high in solids. We are high in suspended solids.

Mr. THORNBURGH. Cross-examine.

The COURT. Mr. Gondelman, if you misunderstood one of my prior rulings, you may certainly ask any question that you want to ask concerning characteristics of water if this Defendant took the water from the river and used it and then it came back out. To that extent you may certainly question as to the test above stream. What we are not concerned with is whether the river itself might have contained substances which are in themselves pollution or industrial waste. What we are concerned with is what was put into it.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Mr. Watts, just getting quickly down to those suspended solids, you are talking there about solids which remain after all other tests are run and everything else really, in effect, is dissipated. Is that correct?

A. Did you say total solids or suspended solids?

Q. Suspended solids.

A. They are taken out of the sample before we run the total solids.

Q. All right, and the volatile solids and the fixed solids are either in suspension or in solution, are they not?

A. Total solids? I may have some of those suspended in the total solids. This is 320, so I have that in there.

Q. Then your total solids?

A. Total solids means everything that is in solution plus the suspension.

Q. When you are talking about "in solution," you are talking about aluminum salt like aluminum chloride, which again, like salt, is dissolved into the water?

A. Right.

Q. In other words, if you take salt and put it in tea and it is dissolved in there, you would say that that salt is a solid in water. Is that correct?

A. Well, it is dissolved in the water. It is a solid that you put in that's dissolved in the water.

Q. If you analyze that tea with sugar dissolved in it, you would have a total solid figure if I gave you that glass of tea to analyze?

A. Right.

Q. As to the suspended solids, these are matters which may settle out of the liquid which are not truly in solution?

A. Correct.

Q. Then am I correct that the 320 pounds per million gallons, that's what that figure shows, does it not?

A. That's part of the 46,832, the 320.

Q. The 320 figure on the exhibit is indicative of 320 pounds of suspended solids as that would relate to one million pounds of water?

A. Right.

Q. And the others are actually in some sort of solution. The others are not suspended, they are in solution.

A. Right.

Q. And the figures you have at 231–2 cannot properly be compared, can they, to the figures shown at 511–1 because you do not have a water rate of flow that would be applicable to 511–1 or 2, whatever that other exhibit is.

Mr. THORNBURGH. Objection, Your Honor, on the same grounds previously mentioned.

(Preceding question was read)

The COURT. I am going to sustain the objection. I want to explain to the jury why.

We are concerned with a statute that makes it unlawful to throw refuse into a navigable stream. We will define those terms to you later. Whether there is already similar content in the stream doesn't make any difference. Let me give you an example which is not applicable, of course, to the particular case. If there is a statute saying that you cannot throw rubbish on the street, it is no relevant matter to say that there is already more rubbish on the street or that this new rubbish won't really make it very dirty because there is already so much there. Nor are we concerned with whether the wind is going to carry some of it away. The statute says that you can't throw rubbish in the street and that's it. That's what we are concerned with here. This is why I am not allowing any evidence in comparing or stating the effect on the river of any refuse thrown into it.

Mr. GONDELMAN. In that case I would ask that Your Honor withdraw from the consideration of the jury and strike all evidence relating to 511–1 and 511–2 because that is exactly what the witness is doing. He is comparing 511–1 and 2 with the samples. I must know what the basis of that comparison is.

The COURT. Do you really want 511 withdrawn from the consideration of the jury?

Mr. GONDELMAN. 511–1 and 2 if it is a basis of comparison, which I think is being shown here.

The COURT. It is not being shown as a basis of comparison at all, but if you want it withdrawn, I will give careful consideration to that.

By Mr. GONDELMAN:

Q. Mr. Watts, what was the purpose of 511–1 and 511–2?

Mr. THORNBURGH. Objection, Your Honor. The witness didn't take 511–1 or 2.

The COURT. You can ask him what use he made of them.

Q. What use did you make of 511–1 and 2?

A. Merely as a record to have on file to see what the condition of the stream is. I have other records, too, that have no connection here. It is just a matter of having a record of what the conditions are of the stream, but I made no comparison. I didn't go ahead and hold this sample here against this sample and run an analysis.

The COURT. Let me ask a question there. The 511 series has nothing to do with what was in the effluent from the pipes. Is that correct?

The WITNESS. Correct, correct.

Mr. THORNBURGH. Your Honor, this witness has already testified that he didn't know what any of these were when they were delivered.

The COURT. That's right, but now, today, 511 as you have testified to it, has nothing to do with any effluent?

The WITNESS. That's right.

The COURT. Do you want them withdrawn? If you want them withdrawn, I am going to do it.

Mr. GONDELMAN. No, Your Honor. Leave it the way it is.

Q. As to 230–1, 231–1, 230–2 and 231–2, those figures have no relationship to 511–1 and 511–2. Is that correct?

A. That's right. I made no comparison between the river samples and your samples.

Q. In fact, you couldn't make any comparison between those two.

A. No. Those are the analyses and they have nothing to do as far as the analyses of the river.

Q. The jury should not try to compare these two because they are not comparable, are they?

A. That's right.

The COURT. That's correct, and that's the way I ruled, that they are are not comparable and must not be compared.

Mr. GONDELMAN. I have no further questions.

REDIRECT EXAMINATION

By Mr. THORNBURGH:

Q. When you received these samples, 230–1, 230–2, 231–1, 231–2, 511–1 and 511–2, was there any other identifying matter that came along with them saying, for instance, that they were connected with any particular discharge?

A. Absolutely not.

Q. As far as you know, each one of these was a sample taken from——

A. Correct. Whether it was 511, whether it was collected from the river or where it was collected I had no idea. I had code numbers. That's all.

Q. And until after you completed your total analyses you didn't know where any of this came from?

A. That's correct.

Mr. THORNBURGH. I don't have any further questions of Mr. Watts at this time.

RECROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Mr. Watts, do you know whether a detergent like Tide, if found in a solution such as was given to you, would result in your finding fairly similar results to those that are shown on your chart as taken from PICCO?

A. Not necessarily.

Mr. THORNBURGH. We are talking about four different solutions here, samples, which vary greatly.

Q. If it doesn't apply to all four, okay. If it applies to one, all right, any way you want it.

A. Say I had a sample of Tide. I wouldn't have the great alkalinity I have there, high alkalinity. I would have a very high phosphate content.

The COURT. I wonder if we couldn't get just a yes or no answer. I think the question is, if Tide was thrown in there would it give you the same results as you found in these four samples?

The WITNESS. How much of it?

Q. You tell me how much you would need. You are the expert. How much would you need to get a sample similar in any way to any of the four samples you have shown?

A. In the first place, in the sample of 4.4 you would probably need a truckload of Tide to bring that up so that you could use it as a detergent and the one up at 10, you would be adding some more Tide to it and I don't think you would want to use—being Tide would have a high pH you would be increasing that pH to about 12 or 13.

The COURT. I think you have misconstrued the question. There has been some testimony that there were houses that might have discharged their wastes into some of these pipes.

We don't know whether or not they did yet. What we want to know is, if those houses would have used Tide, could that be the cause of the condition you have analyzed rather than the industrial use?

The WITNESS. Never, never.

Q. Not at all?

A. Never.

Q. From your testimony it would be impossible to take Tide in solution and arrive at substantially the same type of results you have on any of your four exhibits?

A. I would say so, yes.

Q. And if I asked you the same question about coffee, of course, your answer would be the same. You couldn't have coffee discharged into water that would give you the results on any of the four exhibits that you have testified to?

A. It's true.

Mr. GONDELMAN. I have no further questions.

Mr. THORNBURGH. You are excused.

Mr. GONDELMAN. I would like an offer of proof for this witness.

[Side bar conference.]

Mr. THORNBURGH. Mr. Lisanti's testimony is offered to prove the nature of the source of the discharges identified as 230 and 231. He also is offered to indicate the type of operation carried on by Pennsylvania Industrial Chemical Corporation in terms of what types of chemicals are used as a means of closing the gap which presently exists between the actual discharge and what the process was that produced it. He also is offered to corroborate Mr. Watts' samples with respect to 231–2 because at approximately 3:00 p.m. on August 19, 1970, he took similar samples and performed similar tests, getting similar results, and it would tend to corroborate, although I am not—if we have no problem on it, it doesn't need to be corroborated.

Mr. GONDELMAN. I would like Mr. Thornburgh to corroborate because as wide as he goes, that's how wide my cross-examination goes.

Mr. THORNBURGH. He is called for a very limited purpose. I anticipate possibly having to ask the Court to call Mr. Lisanti as for cross-examination by reason of the fact that I was informed by Mr. Gondelman that he represents Mr. Lisanti personally as counsel and he has prohibited me from discussing any of his testimony with him prior to his——

The COURT. If he becomes adverse—

Mr. GONDELMAN. If the Court please, Mr. Lisanti does not work for my client PICCO. He was engaged as our expert.

The COURT. Did you instruct him not to discuss his testimoney with Mr. Thornburgh?

Mr. GONDELMAN. I instructed him not to discuss it with Mr. Thornburgh. That does not make him adverse.

The COURT. If he does become adverse you can call him as for cross-examination.

Mr. THORNBURGH. Hostile is what I mean.

[Anthony Frank Lisanti, a witness called in behalf of the Plaintiff, having been duly sworn, testified as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Your full name for the record.

A. Anthony Frank Lisanti.

Q. Mr. Lisanti, I am going to ask you a series of questions. I want you to listen very carefully to the questions and answer only the questions that I ask you so that the jurors can have the benefit of the testimony you are giving. What is your occupation?

A. I am a professional engineer, consulting engineer.

Q. Are you familiar with the processes carried on by Pennsylvania Industrial Chemical Corporation at their plant in the Borough of Jefferson, Allegheny County, Pennsylvania?

A. As related to their waste discharges——

Q. Are you familiar with them? Yes or no?

A. I have a familiarity, yes.

Q. What processes are carried on by Pennsylvania Industrial Chemical Corporation at their plant in Jefferson Borough, Allegheny County, Pennsylvania?

A. That's where I have some difficulty because I don't know all the manufacturing processes.

Q. Do you know what they make?

A. Yes.

Q. What do they make?

A. They use solvents and petroleum by-products for the manufacture of polymers and a number of products which are used in other industries.

Q. Do they make organic resins?

A. Yes, they use them and make them.

Q. Are those resins based upon styrene, endene and other hydrocarbons?

A. Yes.

The COURT. How does this witness know these things? I would like to know before you tell us what they make, how do you know what they make?

The WITNESS. Our firm, which is the Chester Engineers, Coraopolis, is a firm which deals primarily in industrial waste and water treatment. We were retained by Pennsylvania Industrial Chemical Corporation in June of 1970 to make a complete survey and analysis of all their waste discharges and to develop for them an abatement schedule and pollution abatement plan which we have done. As part of that we obviously assigned a number of engineers, a number of chemists to determine exactly what is going on in the plant and to determine exactly what was the nature of the discharge and what had to be done with the discharge to bring it into compliance with state and Federal regulations. That was my task. In order to accomplish the task I had to have some knowledge of what was going on in the plant.

The COURT. All right. I know how you know.

I have never seen this gentleman before and neither did the jury, so we had to know how he knew what he was talking about.

By Mr. THORNBURGH:

Q. Mr. Lisanti, do you know the chemical usages of that plant in Jefferson Borough?

A. Yes, sir. I think it is stated in my report.

Q. Can you tell the jury?

A. Yes, I can, but if you give me the report—yes, I have it in front of me.

Q. Would you tell the Court and jury what those usages are.

A. Soda ash—these are approximately—a million pounds a year; caustic soda, a million pounds a year; sulphuric acid, 500,000 pounds a year; aluminum chlorida, salt, a total of about 8,000 pounds a day; barium trifluoride, about a ton a day, 2,000 pounds a day.

Q. Is that boron trifluoride?

A. Boron. I'm sorry.

Q. I show you what is marked as Government's Exhibit No. 1 and refer you particularly to the red circled area. Are you familiar with that source of discharge?

A. Yes. That's a 24 inch concrete pipe.

Q. With respect to Government's Exihibit No. 5, again I refer you to the circled portion there.

A. It's hard to tell, but I think that is that small 5 inch pipe.

Q. And Government's Exhibit No. 6——

A. Yes.

Mr. THORNBURGH. Let the record indicate that I have spread before Mr. Lisanti Government's Exhibits 1 through 6 for his reference during the questioning.

Q. Mr. Lisanti, referring to Government's Exhibit No. 1, which has been identified in this court as outfall No. 230. Did you become familiar with that source of discharge in the course of your examination?

A. Yes, sir.

Q. Did you identify it in any way?

A. Well, I don't recall; probably outfall No. 1, which is a 24 inch pipe.

Q. Did you refer in your report to a discharge of waste from A-poly and from B-poly?

A. Yes, sir.

Q. Which of those would that have been?

A. I'm getting my reports so I can start here. That would be A-poly.

Q. In the other exhibit which has been identified here as discharge No. 231, that would be, in your terminology, B-poly?

A. Yes. That reflects what is tributary to this source.

Q. To use your language, A-poly waste discharge—

The COURT. What is poly?

The WITNESS. It is just a short term for polymer.

The COURT. But I don't know what a polymer is either.

The WITNESS. I am going to have great difficulty telling you that.

The COURT. What is A-polymer or B-polymer? What are we talking about?

The WITNESS. We are talking about different organic compounds that are manufactured.

By Mr. THORNBURGH:

Q. Looking at that first one, No. 230, and your designation of A-poly, are you familiar with the source of the discharge that comes out from that?

A. I would say source of it, yes.

Q. What are those sources?

A. Shall we start at the top of the sewer. As I said, it is a combined sewer. There is drainage from the municipality there, a number of homes that discharge into that combined sewer. There is storm run-off. It then enters the PICCO properties. There is river water into that sewer and there are various manufacturing process discharges into that sewer, all of which are tributary to A-poly.

Q. Do you know what the various manufacturing discharges are?

A. They represent exactly 60 gallons a minute on the average of manufacturing waste.

Q. Qualitatively, what are they? What process do they come from? I refer you to page one of your report.

A. Well, it comes from the manufacturing of a polymer which uses a number of catalysts such as aluminum chloride to manufacture that process, so you have a by-product from the process and this represents a by-product from that process.

Q. The waste from that process is then dumped into the pipe that eventually becomes the A-poly?

A. It does go through a treatment facility first.

Q. After the treatment facility it goes into the pipe?

A. It is discharged into the pipe.

Q. With respect to the B-poly, that's what we have identified here as No. 231.

A. Well, again it is a manufacturing process of a polymer which uses a boron trifluoride catalyst and it goes through a fairly extensive treatment process, the by-product, and is then discharged through this little 6 inch, I guess it is, steel pipe.

Q. Is there any domestic discharge, any of the type of thing that you said was in the A-poly effluent, prior to the dumping of the manufacturing process, in the B-poly one?

A. No.

Q. That's strictly an in-plant discharge?

A. Yes, it is. That's correct, to the best of my knowledge.

Q. What is discharged out of that comes directly from the manufacturing operations, the manufacturing of the resins in the Pennsylvania Industrial Chemical Corporation plant?

A. After it passes through a treatment process, yes, sir.

Q. Referring to page two of your report, the second paragraph, the second sentence.

A. Yes, sir.

Q. What is the makeup of the waste after treatment as it goes into these two discharge pipes?

A. After treatment?

Q. Yes.

A. I think you will have to refer—this describes the waste as discharged by the manufacturing process which contains oil, resins and solvents and so forth. It then goes through——

Q. What else? You said, "and so forth." Oil, resins?

A. Solvents and inorganic catalysts such as aluminum chloride, so forth, and boron trifluoride, but that is what is being discharged. You asked me what is coming out of the pipe, and that's, of course, something quite different.

Q. I asked you what was being discharged from the manufacturing process.

A. This is being discharged from the manufacturing process to a treatment plant.

Mr. THORNBURGH. I have no further questions of Mr. Lisanti.

CROSS-EXAMINATION

By Mr. GONDELMAN:

Q. Let's pick up right there, Mr. Lisanti. Mr. Thornburgh asked you, in referring to your report, what was discharged from the manufacturing process. As I understand it, that is not what is being discharged into the Monongahela River. Is that correct?

A. No, sir.

Q. Let's find out where it goes. Where does it come from, the point at which Mr. Thornburgh left you?

A. We'll take each stream. B-poly goes through a series, if I trust my memory—I could pull out a sheet—but B-poly goes through a series of three oil break tanks where all the insoluble oil is removed. The insoluble oil is removed, taken to another tank and then hauled away or burned in the process. After that the waste, the pH is adjusted to neutralize the alkalinity if it is caustic, to bring it up, and then it goes through another settling tank, an air floatation tank which, in effect, imparts a great deal of little bubbles to it which is what causes any small amounts of oil to rise to the surface and be skimmed off, and that discharge which represents about six gallons a minute goes into the Monongahela River. Our tests show that that facility was very effective in removing oil and solvents. Our tests showed, in fact, it was 98–99 per cent effective. Back over to the A-poly, that goes through a series of settling tanks and

at the present time it goes through a small carbon absorption unit.

The COURT. This is back in August of 1970?

A. Yes. At the time we were there is was going through a small carbon absorption unit. That unit was placed by PICCO. We studied the effect of that so we could develop a total project for them.

Q. You started doing the total project and were engaged by PICCO, the Defendant, in June of 1970. Is that correct?

A. Yes, that's right.

(Defendant's Exhibit A was marked for purposes of identification)

Q. I show you, Mr. Lisanti, what has been marked Defendant's Exhibit A and ask you, with specific reference to anything that you see on the Government exhibits, if you can identify any of the parts of those on Defendant's Exhibit A. Tell us what it is.

A. Yes. This is the sewer pipe for the outfall which has been identified as Exhibit 3 and Exhibit 1.

Q. That is the 24-inch pipe line?

A. Yes, sir.

Q. Could you tell us in the upper left-hand corner, can you tell us what that is?

A. Well, we can start from the beginning of the pipe. The pipe picks up a 10-inch concrete sewer. There are two diversion structures there which pick up the flow and the drainage from, well, so-called Madison Avenue and Second Street in that little development there.

Q. When you say "development," what kind of development?

A. Well, there are——

Q. Residential?

A. Yes, residential.

Q. There are houses up there?

A. Houses.

The COURT. How many?

The WITNESS. I quite frankly do not know.

The COURT. Approximately?

The WITNESS. Tributary of this sewer, maybe twenty. It would be a guess.

The pipe then continues down, comes down into what is PICCO property where it picks up a number of streets—which are PICCO streets—drainage and it goes down in a 12-inch line

which carries river water discharges into there and the treatment plant of A-poly also discharges into this 24-inch sewer and it is carried on into the river.

By Mr. GONDELMAN:

Q. You say there is a pipe which carries river water?

A. Yes, sir.

Q. Would you tell us where that water comes from, if anything is done to it, and how it gets into this 24-inch sewer?

A. PICCO maintains a river pump station. They at one time used river water, to the best of my knowledge, in their plant. They have abandoned a good portion of that use, but they still use it in this end of the plant primarily for cooling or to keep this sewer flowing free. In other words, no product comes in contact with this specific river water.

Q. In other words, there is river water that flows into that sewer which has no chemicals in it and is used in no manufacturing process but in cooling and to keep the sewer clean?

A. Yes.

Q. The river water we are talking about going through there is the Monongahela River, water of the Monongahela River?

A. Yes, sir.

Q. Insofar as the smaller pipe, that's a sewer, too, is it not?

A. Yes.

Q. That's a little 6 inch pipe which is used to bring various flows from various buildings on the PICCO plant into a pipe which is a sewer which discharges into the Monongahela River. Is that correct?

A. Well, not——

The COURT. Why don't you ask him a question?

Mr. THORNBURGH. I was going to object. This is cross-examination, but the situation is somewhat unusual. I would rather have the witness testify.

The COURT. I would rather you ask him what it does.

Q. You tell us what happens to it.

A. There are a number of sewers, various sizes, some 6, some 8 inch, which collect the by-product wastes from B-poly. They discharge to the treatment process which I previously described and after the treatment process it then goes through this 6 inch pipe. These exhibits show what we placed in there to measure the flow. Then they go on out into the stream.

Q. So if I understand you correctly, the 6 inch pipe shown

on these exhibits does collect water from various other pipes which flow into it.

A. Yes. It is the ultimate repository of all that water, yes.

Q. In the water treatment field, in your expertise, is that a sewer?

Mr. THORNBURGH. Objection, Your Honor. He is not qualified as an expert. If Mr. Gondelman wants to call him as an expert he can.

Q. Do you know whether or not that is a sewer?

A. Yes, sir. That is a sewer.

The COURT. Well, there is——

Mr. GONDELMAN. If the Court please, he referred to it as a sewer on direct examination when Mr. Thornburgh was questioning him.

The COURT. I don't know whether it makes any difference whether it is a sewer or a pipe.

Q. As I understand it, your company did prepare a report which was given to Mr. Thornburgh pursuant to his subpoena and from which you have testified?

A. Yes, sir, that is correct.

Q. That is the report to which you have been referring?

A. Yes, sir.

Q. You stated that you had been engaged by the Defendant to design a water treatment facility, I believe, on direct examination.

A. Waste treatment facility.

Q. In connection with what you were engaged in and in connection with that study, were you concerned with the iron, aluminum and compounds containing those chemicals and chlorides, phosphates, sulphates and solids?

Mr. THORNBURGH. Objection. That is beyond the scope of direct examination.

The COURT. I think it is, but I am going to permit you to ask it, but as you go into these phases, this man is your witness.

Mr. GONDELMAN. If he is going to be my witness, I'd rather call him in my case.

The COURT. That is perfectly all right. I don't want to inconvenience him or you.

Mr. GONDELMAN. I am going to be here.

Q. These flows from both sewers are treated at the plant. Is that correct?

A. Yes, sir.

Mr. GONDELMAN. I have no further questions.

[Michael R. Watts, having been previously duly sworn, was recalled and testified further as follows:]

DIRECT EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Watts, you heard Mr. Lisanti's testimony as to the type of manufacturing process that was carried on at the Pennsylvania Industrial Chemical Corporation in August of 1970, didn't you?

A. Right, I did.

Q. Based on that testimony and based on the samples which you tested from the discharges at Pennsylvania Industrial Chemical Corporation, and based on your expertise in the water pollution analysis field, is it your opinion that the results of the tests that you ran are consistent with the manufacturing operation that was described by Mr. Lisanti?

Mr. GONDELMAN. That's just a little leading, Your Honor.

The COURT. The objection is sustained. That is a leading question.

Mr. THORNBURGH. I am asking the question as a hypothetical question from an expert witness.

The COURT. But you told him what his opinion was. I think you can ask him what it is.

Q. Let's go back to the beginning. You heard Mr. Lisanti's testimony, didn't you?

A. Right, I did.

Q. You heard him describing the process that Pennsylvania Industrial Chemical Corporation carries on at their plant.

A. I did.

Q. If that description is correct and if that process is carried on at that plant, is it——

Mr. THORNBURGH. I'll withdraw the question.

Mr. GONDELMAN. I have no further questions.

(Whereupon the luncheon recess was taken.)

Mr. THORNBURGH. Your Honor, at this time the Government has no further witnesses to call and rests its case.

Mr. GONDELMAN. I have certain matters to present, Your Honor, at this time.

[Side bar conference.]

Mr. GONDELMAN. I want to make a motion for a judgment of acquittal under Rule 29 of the Rules of Criminal Procedure,

and I would like an opportunity to argue it to Your Honor because I think there are matters which have not been presented before to you that ought to be taken under consideration.

[End of side bar conference.]

The COURT. Ladies and gentlemen of the jury, there are certain legal matters which must be taken care of, the Government having closed its case, with which you need not concern yourselves. These will take approximately fifteen minutes, so we are going to retire the jury while that occurs and we will call you back afterwards.

[The jury left the courtroom.]

Mr. GONDELMAN. If the Court please, at this time the Defendant moves for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure for the following reasons: First, Your Honor's opening remarks correctly set forth the law that the Government must prove, one, that the Defendant deposited refuse of any kind, and two, in a navigable water, and three, that the refuse matter flowed not from streets and sewers. That is what Your Honor said in the opening. I therefore at this point move for a judgment of acquittal for the reason that the Government has affirmatively proved in its case in chief that the two outlets from which these samples were taken are sewers, one a public sewer, one a private sewer.

In addition, I move for a judgment of acquittal for the reason that under the Federal regulations as they now exist, anyone who does discharge refuse, if it be such, in a navigable stream, has until July 1, 1971, to apply for and secure a permit from the Federal Government. Those regulations are published in the Federal Register and I deem that they are applicable to a trial concerning the Act of 1899 taking place subsequent to the adoption and promulgation of those rules. Basically, those are the two reasons, and I think that would be all that would be required on the record.

[Argument off the record.]

The COURT. You have presented a very capable argument. The motion is denied.

Mr. GONDELMAN. Are you denying them or taking them under advisement?

The COURT. No. I am denying them.

[The jury was returned to the courtroom.]

Mr. GONDELMAN. With permission of the Court, ladies and gentlemen of the jury, Mr. Thornburgh, it is my duty now to open to you on behalf of the Defendant, Pennsylvania In-

dustrial Chemical Corporation, so that you will understand what the defense is insofar as the matters that you have heard about that took place on August 7 and August 19, 1970, when these samples were taken from the pipes and sewers of my Defendant's plant on the Monongahela River. As you have been able to tell, I am sure, many things in this case are undisputed; that is, there is a discharge that comes out of pipes, comes down the bank. That discharge comes from the Defendant's plant. The issues that really will be for you to decide will depend mainly in this case, at this point, on the action of the Corps of Engineers, the implementation of the Act of March 3, 1899. That is the statute under which Mr. Thornburgh has instituted this criminal information against the Defendant.

You understand that this is a criminal case. The Government has the burden of proving its case beyond a reasonable doubt. The Defendant is presumed to be innocent until that presumption is overcome beyond a reasonable doubt. His Honor Judge Teitelbaum will instruct you as to the law and you take your law from Judge Teitelbaum. If I misquote the law it is inadvertent. Lawyers and judges frequently disagree on what the law is. We have courts that go up from here. The Supreme Court decides a case and everybody wonders whether the five to four decisions of the Supreme Court are right. Judge Teitelbaum will give you the law as he sees it.

I am arguing the facts as I see them. Mr. Thornburgh will argue the facts as he sees them at the conclusion. Mr. Thornburgh, I think, reminded you that what I say now and what he says is not evidence. What we try to do under our system of justice is have a lawyer tell you what he thinks he is going to prove. We sometimes misstate what we think we are going to prove because a witness may answer a little differently. Please remember, the only evidence in this case will come from that witness chair, what that witness tells you. I am going to try to point the path, draw the map, so to speak, as to the direction we will be going, but the details come from witnesses and exhibits. If I misstate any of it now or later in my closing, if Mr. Thornburgh does or even if His Honor Judge Teitelbaum does—it is possible sometimes Judges do—they will tell you you don't take the evidence or the facts from the Judge or the lawyers, only from the witness stand. Believe me, if any of us do, it is inadvertent. Sometimes you think you heard something differently than it really was. You rely on your recollections and the evidence.

We are going to put Mr. Lisanti back on the stand. He will testify as to his expert qualifications in water quality control and why he was hired in June, 1970, before the samples were taken by Dr. Zavodni and Mr. Nixon. He will tell you what they were designing and why they were designing it. This water treatment facility cost about $300,000 and was for the purpose of taking certain matters out of the water before it was discharged into the Monongahela River, but what they were designing had very little to do with the items with which we are charged; not with the iron and the sulphates, because you heard Mr. Watts testify there wasn't enough iron to worry about. Mr. Lisanti will tell you why he was hired, what he was attempting to do, what he was in the process of doing and that while this treatment facility was being planned it had to be okayed by various officials.

Then we will put on—I am not too sure who. I think there is a Mr. Dore who is with the Corps of Engineers, a Government employee, and we will ask him about the permit program under the Act of 1899. I think we will be able to show you that there has never been a permit program under the Act of 1899 until 1971, seventy-two years later. The Act of 1899 provides for the Corps of Engineers to issue permits.

We will show you, incidentally, after Mr. Dore's testimony, through probably Mr. Johnston, the vice-president of the Defendant, that in 1949, 1950 and 1956 that applications were made with the Corps of Engineers for permits. We will show you the folders that the Corps of Engineers gave us at that time because they related to permits for structures in navigable waters. When you went in to build a barge or dock loading facility out of wood, metal, concrete block, what have you, they had to approve what you were doing so it would not interfere with the navigation of the river. You had to go to the Corps of Engineers and we went to the Corps of Engineers, I believe, three times and they gave us permits for a water intake pipe so we could take water out of the Monongahela, so the Corps of Engineers knew where we were, knew what we were doing.

We will show you then in March of 1971, for the first time in seventy-two years, the Corps of Engineers now have an application form to apply to the Corps of Engineers for a permit to discharge liquids into the Monongahela River as opposed to building structures in the Monongahela River. The purpose of that will be to show to you—in fact, part of the testimony from

Mr. Johnston will be that he once asked the Corps of Engineers about other permits and they told him there were no other permits required.

You see, this is a criminal case. We are charged with unlawfully depositing refuse matter into the Monongahela River. The question is whether we did it lawfully or whether what the Defendants did in connection with their operation was something unlawful under the law as it then existed. We will get that evidence to you.

Mr. Thornburgh will argue the case from the Government's point of view. I will argue the case from the Defendant's point of view. Then there may be rebuttal and surrebuttal where we will take another crack at closing to you. Then His Honor Judge Teitelbaum will charge you on the law applicable to this case. Then and only then will you twelve—one will be dismissed by then—be in a position to decide this case according to the law, according to the evidence.

I can only say to you that the system of trial by jury in this country is an absolute must for the protection of a democratic process because nobody knows which twelve jurors are going to sit on a jury, neither defense nor Government. No one can influence you in any way other than in this courtroom, and then your decision must be in accordance with your oaths as jurors to decide the case according to the law and the evidence as you hear it in this courtroom. If you do that, we will be certain that justice in this country will continue to be served. Thank you.

[Side bar conference.]

Mr. THORNBURGH. It is not my practice to interrupt counsel in his opening and I do not want to interrupt Mr. Gondelman, but there are a number of matters that he referred to that I think are clearly inadmissible in his defense, and I think the jury at this time should be instructed to disregard them. The fact that they spent $300,000 for some facility to remove other items from the water is clearly inadmissible and clearly not a matter for this jury. The whole matter of Mr. Lisanti's being hired to clear up some problem has nothing to do with this case. I won't object to Mr. Lisanti taking the stand, but I think it is proper that the jury be admonished to disregard that portion of his testimony.

Secondly, with respect to the permit program that has been the gist of the whole argument here, it is irrelevant to this

proceeding and I request the jury be admonished to disregard those comments of Mr. Gondelman.

Thirdly, with regard to applications made for structures and the like, they don't bear on the question of applications for discharge. There is no showing, no indication that an application for discharge was made with respect to these specific discharges prior to the date in question. I think the jury ought not to be led down the primrose path.

The COURT. On that last point, as I understand Mr. Gondelman's argument, because of this they did not have the necessary intent?

Mr. GONDELMAN. That's right.

Mr. THORNBURGH. There is no intent question involved in this and we are prepared to argue that.

Mr. GONDELMAN. How are you going to show it is unlawful?

Mr. THORNBURGH. Unlawful merely means it is against the law to do it. What we are really concerned with is really knowingly——

Mr. GONDELMAN. You are concerned with, in part, the fact that in this case the Defendant was told by the Corps of Engineers that he did not need the permit by the very act of the——

The COURT. If somebody walks into my chambers and tells me, "I earned $100,000. Do I have to file income tax," and I say, "No," that doesn't mean he doesn't have to file income tax.

Mr. GONDELMAN. On the other hand, if the Court please, to use your example, if he takes you down to the agent of the Government, and you say, "I have this problem. Here are my tax returns. This is my total income. How do I treat it?" They say, "If you put this here and here I will figure it out for you," and the agent for the Government does, the man signs the return and the Government comes in and indicts him——

The COURT. That's what I'm trying to point out. The question is what kind of an intent we are concerned with. This is mala prohibita, this is a misdemeanor, and I am not sure if you have to have that kind of intent. With the income tax thing you have got to intend to wrongfully deprive the Government of tax, but now when you get into mala prohibita, I think the rule is that the only intent required is met if you recklessly fail to make the appropriate inquiry.

Mr. THORNBURGH. The Court has held in Refuse Act cases that the element of scienter is not required. The Supreme Court specifically said they are not going to pass on it.

The COURT. I am going to tell the jury that in your opening you made reference to things which may or may not be in accordance with my final charge and that I am not going to ask them to disregard it at this time. I am going to ask them to wait until my final charge before they reach any conclusion, merely pointing out that this is the evidence.

Mr. GONDELMAN. That's all right. What I said isn't evidence.

The COURT. As to the $300,000 and what he was hired for, I agree——

Mr. GONDELMAN. Let me show you why that's so inconsistent. We were hearing from the Penn State instructor and we went back to June and questions were asked, "What was your motive in going out there? How much did you pay for a canoe?"

Mr. THORNBURGH. I can put your witness's motive into question, but you can't.

Mr. GONDELMAN. "How much did you pay for a paddle," and all this stuff came in and it established nothing. I don't know what it was supposed to prove. We went through about an hour and a half. It all totaled up to about $170. I want to show that we are in the process again of producing the water treatment facility and have been in that process before Nixon and Zavodni took their samples, and the Corps of Engineers knew we were there in connection with this discharge, to show again that we were motivated by good faith.

The COURT. But you can't show that you hired him to correct some condition not here concerned.

[End of side bar conference.]

The COURT. Ladies and gentlemen of the jury, counsel was quite correct, and I think I told you, too, we all can make mistakes on the recollection of the facts, counsel and the Court. One advantage of having a one-man court is that there can't be many five-four decisions. The openings that were made are not evidence, as I told you in the beginning. These are merely road maps of what somebody intends to introduce here in court. You must not treat them as any more than that. It may be that either Mr. Thornburgh or Mr. Gondelman said they were going to offer certain kinds of proof, but when they do the Court might rule that that kind of proof is irrelevant and not admissible, so the fact that you were told that you will hear certain kinds of things certainly does not mean that you will. For example, you were told that you will be offered evidence as to why this company was retained in a water control program. Apparently they were retained to put in controls which have nothing to

do with the matters here at issue, so it may be that when that is offered Mr. Thornburgh might object to it and I might sustain the objection, so you must not consider that what Mr. Gondelman said he would offer or what Mr. Thornburgh said he would offer will be admitted into evidence. If it isn't you must not consider it at all.

You must also consider that counsel made their openings in good faith and didn't do that with the intention of saying anything they shouldn't have said, but under the American system of justice counsel on each side, being advocates, present the strongest case they can. They offer the strongest proof they can. The Court, being neutral, might feel contrary about it and you have to only consider the evidence that you actually hear. I hope you understand what I am trying to say. Don't hold anything against Mr. Gondelman's clients if some of the things he said he would prove he doesn't get the proof on, but also don't consider the fact that they were stated as having any bearing on the case whatever.

Mr. THORNBURGH. I would like an offer of proof, Your Honor.

[At side bar.]

Mr. GONDELMAN. You want an offer of proof. I offer to prove, first of all, that Mr. Lisanti is a qualified expert.

Mr. THORNBURGH. We will stipulate to that.

Mr. GONDELMAN. He is stipulating to his expertise. That's fine. That will save five minutes.

I offer to prove that he is familiar with the Defendant PICCO's premises, the water discharge situation there, that they are designing a water treatment facility which, with the exception of perhaps one item in the indictment, has nothing to do with the indictment, but it is for the purpose of upgrading the Defendant's plant to show that this Defendant is not just discharging pure cyanide into the water, as Your Honor indicated perhaps as an example.

The COURT. Not in the presence of the jury, I don't think.

Mr. GONDELMAN. No, of course not, but the fact is it does go to the type of Defendant this is and what they are doing and whether they are acting in total disregard of the law.

The COURT. That is introduced to show they are good boys.

Mr. GONDELMAN. To show they are a good company more conscious of environment and water quality control than Nixon or Zavodni. The fact is, I have to show by this witness and I also intend to show by this witness that every item that the

Government has offered to prove by Mr. Watts, even though he isn't a water expert, he is a chemist——

Mr. THORNBURGH. Wait a minute. Are you going to make that argument?

Mr. GONDELMAN. No.

Mr. THORNBURGH. Because if you are I want to reopen my case to prove his qualifications.

Mr. GONDELMAN. I am not going to argue that.

Mr. THORNBURGH. Well, then don't make statements like that.

The COURT. You can let him testify that he was hired to devise or design a water treatment plant and I think that's as far as you ought to go with it. I don't think you ought to show what he was trying to cure.

Mr. GONDELMAN. I don't intend to show it.

The COURT. In other words, what kind of conditions he was trying to cure. If you want to bring it out, it is your baby and you open it up, but I don't think offhand either how much they were spending or what it was he was trying to take out of the water has anything to do with the case.

Mr. GONDELMAN. Getting down to the meat of this case, so you will know what the offer is as it bears on this case, I will ask him specifically as to each item on Mr. Watts' exhibits as to whether or not those matters are refuse as that term is defined by people in the water pollution industry because that is what your criterion is, not what some Supreme Court said without having a definition before them and without——

The COURT. Do you really think you can do that?

Mr. GONDELMAN. Of course I do.

The COURT. You can ask him whether in his opinion these matters are matters of industrial waste. That is what Mr. Watts testified.

Mr. THORNBURGH. Sure.

The COURT. I don't want you to ask anything about whether or not they are, in the opinion of the people that are enforcing the water control program or concerned with——

Mr. GONDELMAN. No. I am asking whether, in the clean water industry, whether the items which the Government has charged that we have placed in the Monongahela River are considered to be either industrial waste or refuse or pollutants.

The COURT. You can ask whether they are industrial waste because that's what you asked Mr. Watts. I am going to define

industrial refuse, too. You can ask him whether they are foreign substances, but I am going to have to define refuse.

Mr. GONDELMAN. It shouldn't be done either in a vacuum, even if the vacuum was written by the Supreme Court of the United States.

The COURT. Here are the ground rules. Ask him whether they are industrial waste, foreign substances, whether they got in there some other possible way except through the Defendant, but you cannot ask him whether or not it is refuse because I am going to define refuse, and any factor that has to do with that definition you can ask him about, but not the conclusion.

Mr. GONDELMAN. This witness, on the issue of refuse, is offered as an expert witness in water cleanliness and control which Mr. Thornburgh has stipulated he is.

The COURT. All right, but we are not concerned with water control of cleanliness. We are concerned with whether somebody threw those things in the water.

Mr. GONDELMAN. The fact is that this witness would then testify that in the industry, which is the water pollution industry, the items which the Defendant PICCO is charged with having discharged, and therefore being refused under the Act, is, in fact, in the industry not considered refuse.

The COURT. He can't testify to that.

Mr. THORNBURGH. You can't have the industry usurp the Courts and the Legislature.

Mr. GONDELMAN. They do it all the time, but I understand Your Honor's ruling.

Mr. THORNBURGH. I don't want to have to stand up and object every five minutes.

[End of side bar conference.]

[Anthony Frank Lisanti, a witness called in behalf of the Defendant, having been previously duly sworn, testified as follows:]

Mr. GONDELMAN. First of all, would you put on the record the stipulation by Mr. Thornburgh that he is an expert in the water—how do you want to phrase it, Mr. Thornburgh, lest I make a mistake?

Mr. THORNBURGH. You try.

The COURT. Do you want me to make a stab at it?

Mr. GONDELMAN. Then I can't be wrong.

The COURT. Quite clearly I can be. I just want to get something on the record since we are getting Alphonse and Gaston here. Everybody says, "You go first."

This man is stipulated to be an expert on the question of water, water analysis and water purification. Is that all right?

Mr. GONDELMAN. Does that satisfy you, Mr. Lisanti, as a definition of your qualifications?

The WITNESS. I guess it will have to.

The COURT. No, it won't have to. If you are an expert on something else, tell us.

The WITNESS. I would rather you say "waste," since that's what we are doing, industrial waste treatment.

The COURT. All right. You are expert on industrial waste treatment. Is that acceptable, Mr. Thornburgh?

Mr. THORNBURGH. Fine.

Mr. GONDELMAN. And analysis?

The WITNESS. And analysis.

DIRECT EXAMINATION

By Mr. GONDELMAN:

Q. By whom are you employed?

A. Chester Engineers.

Q. How long have you worked for them?

A. About eight years.

Q. I think you have already testified that in June, 1970, your firm was engaged by the Defendant to do some work in connection with the water treatment. Is that correct?

A. That's correct.

Q. You were to design a plant for them?

A. We were to develop a pollution abatement schedule and design a plant, yes, sir.

Q. Mr. Lisanti, you have been in the courtroom yesterday and today. Is that correct?

A. That is correct.

Q. You have heard Mr. Watts testify and Nixon and Zavodni and the others?

A. Yes, sir.

Mr. GONDELMAN. Forgive me for leading, but I think I can shorten it up a little bit.

The COURT. Go ahead until Mr. Thornburgh objects.

Q. You were furnished a copy of the analysis of Mr. Watts that the Government used and had the large——

A. Yes, sir.

Q. Have you reviewed those analyses yourself?

A. Yes, sir.

Q. Mr. Lisanti, in your professional opinion, were the matters which were analyzed in a liquide state or in some other state?

A. Liquid state, no question.

Q. Do you have those charts? Maybe I can do it by letting you testify directly from them instead of waiting for the big ones.

The COURT. Do you have a copy of the report itself?

Mr. GONDELMAN. I have it here somewhere, Your Honor, if I can put my hands on it.

I've got it.

Q. Would you take a look at those—ignore my scribbling—and I ask you if you can recognize that those are the analyses?

A. Yes, sir.

Q. I show you what has been marked Government's Exhibit 7 and I ask you if you can tell by looking at Government's Exhibit 7 whether that analysis constitutes industrial waste?

A. Well, first of all, from an engineering standpoint it is foolhardy to attempt to look at an analysis and say whether it is industrial waste or any other material without knowing flows, poundage, sources. Let me give you a couple of examples, including Mr. Watts' example. You look at the pH. It is alkaline, but there are many household products, many things you can use to produce that alkalinity. To look at an analysis and say it is industrial waste, I don't think that is engineeringly possible. If you know the total picture, then you can tell whether or not it is, in fact, a discharge from an industry.

Q. In order to determine whether a matter is industrial waste, is the contents from the sample itself sufficient or are there other factors which you must know in order to make that determination?

A. To repeat myself, you must know other information. Just looking at a quart jar and analyzing—unless there was something such as cyanide, yes, that comes from industry. That doesn't come from foodstuffs, but if you see, as I say, if you see chlorides, that's salts. Chloride is chloride. Whether it is table salt or hydrochloric acid you are going to see chloride. Sulphate again is sulphate, whether it is a cleaning compound—you will get tremendous quantities of sulphate from household products. The same with alkalinity, so to make a judgment without some specific industrial pollutant, such as cyanide, lead, chrome, something that is toxic, then I think one should, at least an engineer, should not make a judgment.

Q. Is it important in your industry when you are determining the question of industrial waste, to know into what receptacle or what stream of water that sample is going to end up in?

Mr. THORNBURGH. Objection, Your Honor. The question is irrelevant. What is done in the industry has no bearing on the question of law involved.

The COURT. All he asked him is whether or not he can answer the question.

Mr. GONDELMAN. As to industrial waste.

The COURT. Objection overruled.

A. Yes, obviously you must know what is the source water. You must know that sort of data, yes.

Q. When you say "source water," what do you mean?

A. Well, if your intake is river water and, as Mr. Watts demonstrated, there are 200 parts sulphate and you are putting water out, you are going to assume you are going to get 200 parts of sulphate back out.

Q. My question now is, on the other end when it is being discharged from a pipe, a sewer, can you, by simply sampling at the discharge point, determine what is or is not an industrial waste without knowing what it is going into?

A. Oh, no. No, sir.

Q. Why not?

Mr. THORNBURGH. I renew my objection to that question and move the answer be stricken because it is not relevant to the purposes of this proceeding. We are dealing here with the discharge itself.

The COURT. That is what he is asking him.

Mr. THORNBURGH. He asked him if it is important to know what it is being discharged into.

The COURT. He said, can you, coming out of a pipe, tell what it is if you don't know what it is going into. I don't know what the answer is going to be.

Q. The question is as it relates to industrial waste.

A. Unless there is something that is readily identifiable, for example, if there is textile dye coming out of it, you are safe to assume that is coming from a textile plant, or if you have a tremendous quantity of insoluble material coming out such as shale deposits, you could say that that is from industry, but if you look at a solution that has 140 parts of suspended matter and this sort of analysis, you would not know that that is industrial waste until you knew the facts behind it.

The COURT. He is asking you if what you are pouring it into has anything to do with it?

Q. Does the fact that this matter from this sample is going into the Monongahela River——

The COURT. Or a bucket or any other thing.

Q. [Continuing] does that have anything to do with your determination as to whether or not what is in the sample is or is not industrial waste?

A. Yes, primarily because the State and the Federal Government have established water quality standards.

Mr. THORNBURGH. I object and move that it be stricken.

The COURT. The jury is instructed to disregard it.

When something is coming out of a pipe and an analysis is made of it, if you know what industrial waste is, can you tell if it is industrial waste or not without knowing what the receptacle into which it flows is going to be?

Q. Without knowing the water flow of the river, the amount of water in the river and the like.

The COURT. Does that have anything to do with what the contents of the effluent are? Do you understand the question?

The WITNESS. Yes. What is coming out of the pipe is coming out of the pipe. What is in the river is in the river. I'm lost.

Q. Without worrying about what is in the river, is it necessary in your determination of industrial waste to know that if it goes into the Monongahela River, do you have to know the rate of flow into the Monongahela River, the amount of water and other such factors to make your determination, under a given set of circumstances?

Mr. THORNBURGH. I object to the question as being irrelevant.

The COURT. I think it is relevant. This is a question as to whether or not Mr. Watts could tell whether it is industrial waste.

Q. Without knowing what it is going into and the water flow. This is basically what I am asking you.

A. No.

Q. Your answer to that question is no?

A. No.

The COURT. No, what? You couldn't tell?

The WITNESS. No, you could not tell just by looking at the pipe whether it is industrial waste.

Q. Or by looking at the sample?

A. Or by looking at the sample.

The COURT. You couldn't tell by looking at the sample whether that is industrial waste or not?

The WITNESS. This particular sample.

Q. That would be true of the four samples that you have reviewed?

A. That is correct.

Q. Without going into any other regulations or agencies—do you follow me?

A. Yes, sir.

Q. Without getting into that, can you tell me why not? Can you tell me why not you cannot tell whether something is industrial waste without knowing what it is going into?

The COURT. What we are interested in is what is coming out, not what effect it is going to have after it gets some place.

The WITNESS. It is tough to answer in that frame of reference.

The COURT. That's the question.

The WITNESS. Yes, I appreciate that. Well, my best judgment is that you must know the receiving receptacle to determine whether or not it is industrial waste because—I keep coming back to effect.

The COURT. No, no, we are not interested in effect.

The WITNESS. That is why I am having a difficult time answering the question. I cannot answer that without getting into the effect.

Q. Your answer is you cannot tell whether it is industrial waste without knowing what it is going into?

A. That's right, sir. I will get myself into these other matters about which I have been restricted.

Q. Is there any question in your mind, sir, that the exhibits, 230–1, which you have before you, 230–2—just take a look at it for a moment—231–1 and 231–2, can you tell us whether, in your opinion, those matters were in a liquid state?

A. Yes, they were in a liquid state.

Q. Could you tell us whether any of those samples contained materials which would have in any way interfered with the navigability of the stream known as the Monongahela River?

Mr. THORNBURGH. Objection.

The COURT. Overruled.

A. Certainly not because when you ask that question you must look at the total pounds and what is going to be deposited in the navigable rivers and you also look at suspended matter which is the only thing that can be deposited. You are talking about insignificant quantities. You wouldn't even see them on

the river. You could not detect these in the Monongehela River.

The COURT. You weren't asked whether or not you could detect them. Will it stop ships from going up and down the river or in any other way impair navigation?

The WITNESS. No. It is inconceivable.

Mr. GONDELMAN. Cross-examine.

CROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Lisanti, you testified that simply by looking at those analyses that are set forth on the exhibits, simply by looking at them you could not say they were industrial waste.

A. No, sir, you certainly couldn't.

Q. You certainly couldn't say.

A. No, not by just looking at an analysis.

Q. You said you would really have to know the total picture before you could decide whether these were——

A. Yes, sir.

Q. You would have to know the process that was involved that gave rise to those discharges, wouldn't you?

A. Yes, sir.

Q. You would have to know the products that were used?

A. Certainly.

Q. You would have to know the sources of all of the outflow that eventually came out from the——

A. That's correct.

Q. You would have to know all that.

A. Yes, sir.

Q. How do you define an industrial discharge? Is it only one that contains a cyanide?

A. No, sir.

Q. How do you define it?

A. I define an industrial discharge in our profession the same as the State and Federal Government defines it, which is something that is pollutional in nature. Something that contravenes or violates standards is, in fact, industrial waste.

Q. That is how you define industrial discharge?

A. I believe that's how sanitary engineers do it.

Q. When you use the words "industrial discharge," you are going back to the standards that the State and Federal Govern-

ment use and you say you can't tell just by looking at these samples whether they are industrial discharge.

A. Yes. I am doing that and I am also stating that merely looking at chlorides, sulphates and so forth does not per se indicate that is industrial. It could be household, it could be many many other things.

Q. You have to know a lot more about it?

A. You certainly do.

Q. Wouldn't one way of defining industrial discharge be "discharge from an industry?" It may not be your way.

A. You say "industrial waste?"

Q. Waste from an industry.

A. We get back to industrial waste, waste water. Yes, that's one way. I wouldn't define it as industrial waste, obviously.

Q. You said you couldn't tell whether or not this was industrial discharge when you said it didn't have anything toxic, any cyanide and the like in it. Is that the test you would use in determining it to be specific industrial discharge?

A. I would try to pinpoint—if I had this blank sample, a quart sample, and you asked me if this was an industrial waste, my first question would be, "What industry is it from?" I wouldn't attempt to make a decision, finding sulphate or solids in it.

Q. You would have to determine or have somebody tell you what exactly went into the process, the chemicals and the like?

A. That is correct.

Q. Just as you testified this morning.

A. Yes, sir.

Q. If you had the samples and if you had the backup data on the process being used and the exact type of chemicals that were being used in that process, you could make a determination as to whether or not it was industrial waste?

A. Yes. Again, you have compounds here which are not very specific to a process, particularly this process. That is our problem here.

Q. Let me ask you about these samples.

A. Yes, sir.

Q. Government's Exhibit No. 7, 230-1. Do you know the process at Pennsylvania Industrial Chemical Corporation?

A. Yes, sir.

Q. You have looked at that sample. Is that industrial waste?

A. That is an industrial discharge. I would not say waste. It is really not the waste from that product.

Q. Let's look at 230–2. You know the process, you can look at the sample. Is that an industrial discharge?

A. Yes. We have run an analysis and——

Q. Let me ask you about 231–1. You know the process, there is the sample. Is that an industrial discharge?

A. As I say, it could be from the industry, it could be from other places, but that's correct.

Q. 231–1 could be from an industry or other places?

A. That's right.

Q. What other place could it be from?

A. The six inch pipe.

Q. Yes, from the plant.

A. Yes, that's right.

Q. 231–2, what you call the B-polymer.

A. Yes, that is industrial discharge.

Q. I believe your testimony was that you couldn't tell whether a given sample was an industrial waste not only if you didn't know the process but if you didn't know what it was going into. Wasn't that your testimony?

A. That's right. Again, in my frame of reference as to what is industrial waste, pollutional, I must know what it is going into.

Q. Would it make a difference if it was going into a wheelbarrow and being carried away?

A. Sure.

Q. It would make a difference. What difference would it make?

A. It is the effect on the wheelbarrow.

Q. I'm not asking about the effect.

A. How are you going to judge industrial—

Q. Are you telling me it doesn't make any difference except for the effect? I am suggesting to you that what comes out of the pipe comes out of the pipe regardless of what it goes into.

A. Well, what comes out—except if what it goes into is used in the process, then obviously you must take that net effect.

Q. I think you said in response to Mr. Gondelman with respect particularly to 230–1—you might want to look at this again.

A. Is this A-polymer?

Q. This is A-polymer. When Mr. Gondelman asked you about this you said it might be household waste.

A. It is conceivable. It has all the characteristics of some of the compounds you would normally find.

Q. You know the process at Pennsylvania Industrial Chemical?

A. Yes, sir.

Q. Do you think it is household waste? Do you really think that is household waste?

A. I will tell you that it is not specific to PICCO's process.

Q. You really think that is household waste?

A. I really think that you have not determined specific quantities which pinpoint those to PICCO, yes, sir.

Q. Let me ask you about No. 230–2, which is the same outfall taken on the 19th of August. Do you think that is household waste?

A. That I would doubt because of the pH.

Q. Where do you think that came from?

A. I'd say certainly a good portion of that came from PICCO, yes, sir.

Mr. THORNBURGH. No further questions.

REDIRECT EXAMINATION

By Mr. GONDELMAN:

Q. The portion in 230–2 that you say came from PICCO and, again as you define industrial waste in your business and your profession, are the matters contained in 230–1, 230–2 and 231–1 and 231–2, in your expert opinion, are those matters industrial waste?

A. Only the pH and the high concentration of aluminum in one of them. Other than that, as I am sure anybody can demonstrate, they will be found, in fact, in drinking waters. Many in this country have exactly the same concentrations.

Mr. THORNBURGH. I move that the answer be stricken as not responsive. He is getting into the standards.

The COURT. Let's get him down to the point.

Q. I will simply ask you whether, in your opinion, that would be industrial waste in your industry and in your opinion as an expert and knowing the flow of its receptacle, being the Monongahela River.

A. That would not be industrial waste from PICCO. That is not the industrial waste we are concerned with from PICCO.

Q. As that term is defined in the water pollution or control industry?

A. That is correct.

The COURT. So that I clarify my thinking on this, sir, if you take the effluent from this pipe and you put it in a great big sterile water glass container—now, you have got it in there. At that stage you say you can't tell whether it is waste or not?

The WITNESS. No, sir.

The COURT. You can't tell?

The WITNESS. No, sir.

The COURT. So if you take it and put it into a small pond of water, now could you tell, knowing that it is a small still pond, whether or not it was waste?

The WITNESS. You could tell it has obviously some effect on that.

The COURT. See, you are talking about effect.

The WITNESS. Yes, sir, I have to.

The COURT. If you put it in a pond it is one thing, if you put it in the ocean it is something else?

The WITNESS. Certainly. That is my problem.

The COURT. I know what you are saying.

By Mr. GONDELMAN:

Q. In fact, what the Judge just asked you as to the fact of whether it goes into a pond or ocean or river, that is what you as an expert must know in order to make your determination or your analysis?

A. Yes, sir.

Q. In fact, am I correct, that in preparing a water treatment facility what you would prepare for a small stream may be different than what you would prepare for a large stream?

A. You would certainly have to.

Q. Because of what it is going into?

A. Yes, sir.

Mr. GONDELMAN. I have no further questions.

The COURT. But that wouldn't change the quality of where you were going to throw it. All that would do is change the effect it is going to have.

The WITNESS. Yes, that's correct.

By Mr. GONDELMAN:

Q. The effect it is going to have is what your industry uses in determining whether or not it is industrial waste?

A. That's right.

RECROSS-EXAMINATION

By Mr. THORNBURGH:

Q. So we have a clear distinction between what you call industrial waste, which is something that you speak of in terms of the industry and in terms of effect, and industrial discharge, which you have described all four of the samples here as being——

A. Yes, sir. In my frame of mind I have to differentiate.

Q. I understand that. I am sympathetic with your difficulties being——

The COURT. We have a technical problem.

The WITNESS. I appreciate that. I am having problems, too.

Q. But you would have no problem identifying the samples in these four bottles, knowing the process which produces them, as industrial discharge. You do have a problem reaching whether or not they are industrial waste because you have to get into matters that the Court is not permitting you to. Is that correct?

A. That is obviously correct.

Q. Do you know any other way to collect water samples than in a liquid state?

A. Water samples?

Q. Yes.

A. If it is water it has got to be in a liquid state.

Q. How about a liquid matter? You can't collect samples of any liquid matter other than in a liquid state, can you?

A. No, no. If it is liquid you collect liquid.

Mr. THORNBURGH. I have no further questions.

(Whereupon Court recessed until Monday morning, June 28. 1971.)

JUNE 28, 1971.

Mr. THORNBURGH. Your Honor, may we have an offer.

[Side bar conference.]

Mr. GONDELMAN. If the Court please, Mr. Helwick is a chemist employed by Chester Engineers. He has run certain tests, taking the Government's exhibits and analyses of the discharges of August 7 and August 19, including the pH factors. He has certain samples prepared to show that the discharges and the percentage of discharges, the pH factors, chloride factors, are not industrial waste per se, that they do have common household derivatives. We have the fluid samples to show what

is or was not in a liquid state since there was some question about whether or not 15 pounds per million is a liquid state. We have 20,000 pounds per million, which is a clear fluid that Your Honor and the jury would be able to see is in a liquid state. He is going to testify that he took water and he added a detergent, he has a coffee solution, he has a sodium chloride solution to show what—

Mr. THORNBURGH. What water?

Mr. GONDELMAN. Just plain ordinary water, and he added substances.

Mr. THORNBURGH. Without a showing that that water is the same water that wastes from this operation we are into, I'd object to the whole line of testimony.

The COURT. He is going to show how the solution of this kind is in a fluid state? Isn't that what you are saying?

Mr. GONDELMAN. First, that it is in a liquid state, and two, that it comes from many, many household uses.

The COURT. All right. In other words, if he can show that what your man says was in there could come from household waste, it's relevant, I think.

Mr. GONDELMAN. It's common waste; coffee.

Mr. THORNBURGH. He is, in effect, impeaching his own witness. The other expert, his opinion——

The COURT. He is using it to contradict your expert.

Mr. THORNBURGH. It was his witness who testified that all four of these, as Mr. Lisanti on his case, not my case, testified——

The COURT. Who did you have testify?

Mr. THORNBURGH. Mr. Watts.

The COURT. Isn't that who you are attempting to contradict, not impeach your own witness?

Mr. GONDELMAN. That is correct.

Mr. THORNBURGH. Aren't we stipulating as to the accuracy——

The COURT. The accuracy of his analysis, but not that it is household waste rather than industrial waste.

Mr. THORNBURGH. I get back to the opinion expressed by Mr. Lisanti, his first expert. His opinion was that it came from the operations of the Defendant. Is he putting this man on to contradict Mr. Lisanti, that it didn't come from the operations of the Defendant? Does he have one witness to corroborate Mr. Watts and one to contradict him?

Mr. GONDELMAN. Mr. Lisanti testified that without knowing all the factors you could not look at the chart and tell——

Mr. THORNBURGH. I think we can strike Mr. Lisanti's testimony in bulk. I don't think he testified to anything.

Mr. GONDELMAN. I think you could do it with Watts, too.

The COURT. I don't agree with that. He said based on the criteria that he had available he couldn't reach any conclusions.

Mr. THORNBURGH. I don't see the relevance of this testimony.

The COURT. This waste is going into one of these outlets—that's the basis of two of the counts—from these houses. You had a man that says these kinds of products come from a manufacturing process. His man is going to say no, they didn't. They come from twenty houses. I think that's a relevant thing.

[Robert Helwick, a witness called in behalf of the Defendant, having been duly sworn, testified as follows:]

DIRECT EXAMINATION

By Mr. GONDELMAN:

Q. Would you state your full name, sir.

A. Robert Helwick.

Q. Where do you live, Mr. Helwick?

A. In Kennedy Township, 1045 Middlebank Drive in Kennedy Township.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family, sir?

A. Yes.

Q. Where are you employed?

A. Chester Engineers.

Q. Would you tell us what your educational background is.

A. I have a Bachelor of Science degree in chemistry from the University of Pittsburgh, received in 1965.

Q. How long have you beem employed at Chester Engineers?

A. Three years.

Q. Mr. Helwick, did you receive copies of analyses made of certain discharges that are involved in this case?

A. Yes, I did.

Q. I show you, sir, what have been marked Government's Exhibits 7, 9 and 12 and ask you if these exhibits are the analyses which were shown to you, although they may have been in this form, the small form.

A. Yes, they are.

(Defendant's Exhibits B, C and D were marked for identification.)

Q. I now show you, sir, what have been marked Defendant's Exhibits B, C and D and ask you if you can identify what is shown on those exhibits.

A. Yes. After I had reviewed this analysis we attempted to see whether we could duplicate these analyses using regular household items. For example, on Defendant's Exhibit B, which, looking at Exhibit 7, of interest was the pH of 8.8, the alkalinity, the aluminum and the total solids. What we attempted to do was to take these regular household items and we used, as a source of aluminum, we used Kaopectate, and we used a detergent, Miracle White, which we used to adjust the pH. We also added some ordinary table salt, sodium chloride, for the solid content.

Q. I show you what has written on it 230–1–4 and ask you if you can identify what that substance is.

A. Yes. We took ordinary tap water and we added Kaopectate. Actually, I have the amount we had added. Well, it is approximately enough so we would get about 40 milligrams per liter of aluminum. We added about two ounces of Kaopectate to a quart.

Q. Two ounces of Kaopectate to a quart of water?

A. That's right.

Q. And that gave you the analysis which you would get as to 230–1–B or Exhibit B?

A. That's right. We also added some ordinary table salt, just approximately an eighth of a teaspoon.

Q. An eighth of a teaspoon of common table salt. Is that sodium chloride?

A. Yes.

Q. That's what gives the chloride content?

A. That's right.

Q. Is that an eighth of a teaspoon to a quart?

A. Yes.

Q. Will you tell us all the things you did loudly so the Judge and jury can hear you so I won't have to repeat it.

A. Okay. Then we added enough Miracle White detergent to bring the pH to 8.8 and it took approximately one gram per liter of detergent, which would be roughly a teaspoonful per gallon or so, and we came out with the following analysis as

to this Defendant's exhibit. The pH should have been 8.8, total solids, 3,953, alkalinity 260 parts per million.

Q. Would you mark on that exhibit what your pH factor is. There is a typographical error.

A. Yes. It should have been 8.8.

Q. The other figures on the typewritten exhibit are the same as those of your notes, sir?

A. Yes, they are. There are no phosphates, a thousand parts chlorides, 200 parts of sulphates.

Q. In relation to a housewife using detergent in a washing machine, could you tell us, if you know, how much detergent was used in connection with this solution as it would relate, say, to one load of wash in a washing machine?

A. Well, assuming that the housewife would use a cup to a cup and a half per washer load, this would probably be one-fifth or less. She would use five times the amount at least.

(Defendant's Exhibit B–1 was marked.)

Q. I show you, sir, what has now been marked Defendant's Exhibit B–1 and Defendant's Exhibit B and ask you if these two items relate to each other?

A. Yes, they do. This is the analysis for this particular sample.

Q. As a chemist, do you have an opinion, sir, as to whether Exhibit B–1 is or is not in a liquid state?

The Court. Let's find out what he is talking about. What does he mean by a liquid state?

The Witness. When I speak of a liquid state I would think that all the solids are in solution. There are no suspended solids.

Q. With that definition in mind, is it your opinion that Defendant's Exhibit B–1 is or is not in a liquid state?

A. Yes, it is.

Q. When you defined the term for Judge Teitelbaum, is that the definition of the term as it is used in the industry?

A. Yes, it is.

The Court. Tell me, sir, could those items that you have said, could that be in a substance and be in a suspended as well as a liquid state? You have got them in a liquid state. Could this be in a suspended state?

The Witness. Most chlorides most probably would always be in solution. With the aluminum it would depend on certain factors. If you had just plain distilled water, the ionized water, no other compounds in it, and you added aluminum and the pH was right, let's say around 7, the aluminum could

form aluminum hydroxide and be in a suspended state. If the pH was higher than, let's say, 10 or lower than 5, the aluminum would be soluble.

The COURT. So it could be in either a solid or a liquid state?

The WITNESS. Depending on what compounds and what conditions.

The COURT. Did you see the samples, the fluid that was taken from these pipes?

The WITNESS. No, I haven't.

Q. If there are suspended solids in a liquid, in your opinion, would 15 pounds of suspended solids in one million pounds of water render that particular solution a solid or would it still be in a liquid state?

Mr. THORNBURGH. I object to that, Your Honor.

The COURT. Sustained. That isn't the question.

Mr. GONDELMAN. Certainly I beg to differ.

The COURT. You have a right to differ with me, but I don't think that's the question.

Q. That Exhibit B relates to Government's Exhibit 7. Is that correct?

A. Yes.

Mr. GONDELMAN. If the Court please, I offer in evidence Defendant's Exhibit B and Defendant's Exhibit B–1, being the solution itself.

The COURT. Hearing no objection——

Mr. THORNBURGH. I do object. I don't see any relevance to these series of tests that have been performed on another substance here. The questions that are involved and the tests taken are the actual discharges from the pipe, and I am going to object to them on the grounds of their not being relevant to this proceeding.

The COURT. I am going to admit them as relevant only on the question of whether they could or could not have come from household discharge. I am not going to admit them on that argument about whether it is solid or liquid.

Mr. GONDELMAN. I accept Your Honor's ruling, of course, because I think there is no argument about whether it is solid or liquid.

The COURT. That wasn't what I ruled. I think you know that. This man says that it could be solid and it could be liquid. Therefore, I am not allowing it in for the purpose of whether it was a solid or liquid. You can put anything into a liquid state

if you control the circumstances, or you can put anything into a solid state.

Mr. GONDELMAN. Based on the circumstances as he testified they existed, they were in a liquid state.

The COURT. No. I don't think so and I'm not going to admit them for that purpose.

(Whereupon Defendant's Exhibits B and B–1 were admitted as indicated by the Court.)

By Mr. GONDELMAN:

Q. I show you now, sir, what has been marked Government's Exhibit 9 and Defendant's Exhibit C and ask you if those two relate to each other?

A. Yes. Once again, we looked at this analysis and, using ordinary household items, we wanted to see if we could add these items into water and see what analysis we would have. What we did, we took a cup of coffee with cream and sugar and we added 80 milligrams per liter of aluminum in the form of Kaopectate again, and we ran the analysis on it. The pH of this was 6.6, the aluminum content was 80 milligrams per liter, 540 parts chloride. We also added some table salt, sodium chloride, and we found total solids of this coffee plus Kaopectate was 71,000 milligrams per liter. By the way, we also ran this coffee without the Kaopectate and we had 64,000 milligrams per liter solids.

(Defendant's Exhibit C–1 was marked for identification)

Q. Based on the factors as shown in Exhibit C and the solution which has now been marked Exhibit C–1, without what could or could not be, but rather as a matter of an expert giving his expert opinion, is Exhibit C–1 in a liquid state or in a solid state?

A. Right now——

Mr. THORNBURGH. I object to that, Your Honor. That is the same——

The COURT. Sustained. I don't care whether that sample is in a liquid or solid state. I am concerned with what came out of the pipes. This man said in answer to my question it could be either liquid or solid. We did have an analysis of that made and it is on the record, so I sustain the objection.

Mr. GONDELMAN. If the Court please, I offer in evidence Exhibits C and C–1.

The COURT. I am going to admit them for the purpose I said. We will let the argument go to the jury.

Mr. THORNBURGH. I would object, Your Honor, to the introduction of both these exhibits into evidence in that they relate to the outfall at No. 231, which is an in-plant outlet, and there has been no evidence as to any household waste into that. I would move that all these exhibits and all the testimony thereto be stricken.

Mr. GONDELMAN. This is 231, Your Honor.

The COURT. I will sustain the objection. There was no household flow into that, unless you plan to show such a flow.

Mr. GONDELMAN. No, Your Honor, and I assume the ruling would be the same as to Exhibit D and D–1 which I had marked which relate to 231–2.

The COURT. Is that the concrete pipe? I will admit that in evidence.

(Whereupon Defendant's Exhibits D and D–1 were admitted into evidence.)

Mr. GONDELMAN. I believe the only one relating to the concrete pipe is Exhibits B and B–1, but I am offering these and I would want it made part of the record.

[Side bar conference.]

Mr. THORNBURGH. I didn't realize until I saw that sheet which one he was talking about.

The COURT. Are you going to show that there is any way household waste could have gotten into the other pipe? If you can, I will certainly admit it.

Mr. GONDELMAN. I don't know what could have gotten into that pipe, but since Your Honor has already indicated that you were going to somehow define "refuse" in the abstract and nonpertaining to particular substance matter, I think it is relevant to show that what you define as "refuse" is no more than ordinary household waste, whether it is in our pipes or not. It doesn't matter whether it comes from twenty houses around our plant or whether it comes from our plant, it is still, under a given set of circumstances, not refuse in anybody's legal definition of it, and the jury can't decide this case in a vacuum, but they must know what is or is not refuse. The purpose of this offer is to show that under a given set of circumstances, a teaspoon of salt will produce more chloride than is found in what you are going to define to the jury as somehow "refuse."

The COURT. Could Kaopectate or coffee with cream have gotten into the iron pipe which was only carrying the flow from that polymer?

Mr. GONDELMAN. I don't think as to 231. As to 232 it could have gotten into the pipe, but the point of the offer is that the same substances which came out of that pipe are commonly used household substances which also flow into streams.

The COURT. I understand your argument. I have sustained the objection.

Mr. THORNBURGH. I ask that the jury be instructed to disregard all except the first series of things as to B and B-1. I should have objected in a timely fashion. I wasn't on my toes.

[End of side bar conference.]

The COURT. Ladies and gentlemen, you will recall two outlets. One was a concrete pipe containing household drainage as well as the effluent from the industrial plant. As to that, I have admitted evidence that what they found there could have been the result of household products flowing into the concrete pipe. The other was a little iron pipe that didn't have any outlet from any house, any residence, so even though you could perhaps have produced what came out of there from household waste, since it didn't have any, I have sustained the objection as to the iron pipe and I ask you to disregard any testimony as to what could have caused that substance to be in the iron pipe. Of course, if any evidence is introduced to show that there was any such outlet into the iron pipe, I will reconsider, but as of right now, I am sustaining the prosecutor's objection only as to the iron pipe, not as to the concrete pipe.

Will you tell me what exhibits refer to the iron pipe?

Mr. GONDELMAN. The only one in evidence, Your Honor, Exhibits B and B-1, and C——

The COURT. B and B-1 have been stricken and C and C-1, and you are instructed to disregard anything you may have heard about how anything could have gotten into that iron pipe.

Mr. GONDELMAN. It is B and B-1 which are admitted.

The COURT. B and B-1 are admitted because it comes from the concrete pipe.

Mr. GONDELMAN. Because it relates to the exhibits which compare from the two foot concrete pipe.

The COURT. It relates to the effluent from the concrete pipe. That is before us. The others are not.

Mr. GONDELMAN. As I stated, that also goes as to D, as if I want through the same offer only we might as well save time because I am sure the ruling would be the same.

The COURT. Right.

By Mr. GONDELMAN:

Q. I am now showing you, sir, what has been marked Defendant's Exhibit E and ask you what is in that exhibit.

A. This is ordinary tap water to which we added 20,000 milligrams per liter of sodium chloride, common table salt.

Q. You say 20,000 milligrams of common table salt. Could you tell us how big a milligram is? Something that we can relate to. What is 20,000 milligrams?

A. Well, this is, of course, equal to 20,000 pounds of sodium chloride per million pounds of water. It is about a teaspoonful in about a quart of water, or perhaps a glass of water, eight ounces.

Q. A teaspoonful of ordinary table salt in a glass of water?

A. Yes, that's right.

Q. And you say that is equivalent to 20,000 pounds of sodium chloride in a million pounds of water?

A. Right.

Q. Is that in solution or is that somehow a solid or what is it?

Mr. THORNBURGH. Objection, Your Honor. That is the same type of question.

The COURT. Same thing as I sustained the objection to before, unless you establish that it could only be one way. If it could be both ways then it doesn't serve any purpose.

Mr. GONDELMAN. I don't think I can ask him, "Could this be something," could I, Your Honor?

The COURT. Yes, you could; could it be either solid or in a solid or liquid state?

Q. Well, let's take the Judge's question. Mr. Helwick, looking at Defendant's Exhibit E, could that be in a solid state——

The COURT. That's not my question. Could these contents be in an effluent in either solid or liquid state? I am perfectly aware that this could only be one. I want to know if those contents could be in an effluent in either a solid or a liquid state?

Q. The Judge asked you a question. If you want to answer it I don't have any objection.

A. These contents would probably be in, under ordinary conditions, a liquid state. The only way you could get that precipitated out is if you add so much sodium chloride and exceed the saturation——

The COURT. In other words, ordinarily sodium chloride will

be in a liquid state. It is not going to be in suspension. Is that right?

The WITNESS. That is right, if you put it in water.

Q. Would you tell us proportionately what this jar contains so far as liquid and solids are concerned?

A. This has 20,000 milligrams per liter of solids, sodium chloride, which is a teaspoon in about a glass of water, which is about—well, if someone were to gargle with it, they would probably use two or three times that amount.

Mr. GONDELMAN. I offer in evidence Defendant's Exhibit E, Your Honor.

Mr. THORNBURGH. Objection, Your Honor, again on the ground of relevancy.

The COURT. Is there any one of these things that only had sodium chloride? We are going to admit that for the purpose of proving to you, ladies and gentlemen, that if you put salt in water it will dissolve.

Mr. GONDELMAN. And remain in a liquid state.

The COURT. Oh, yes, and remain in a liquid state. Anybody that has put salt in water and stirred it up could make their test.

CROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Helwick, when did you run these tests?

A. Saturday.

Q. Where?

A. Chester Engineers' laboratory.

Q. How long did it take you to run these analyses?

A. Well, of course, we were busy preparing them, but the actual running of the analyses probably would take, on all the samples, about two hours, three hours.

Q. So you spent about three hours on Saturday running these tests that resulted in the data you brought in today?

A. Yes.

Q. Referring to what has been marked as Defendant's Exhibit B, you ran, I think you stated, a test for total solids. Is that correct?

A. Yes.

Q. Did you run a test for volatile solids?

A. No.

Q. Fixed solids?

A. No.

Q. Did you run a test for suspended solids?
A. No.
Q. Your total solids figure was 3,953?
A. That's right.
Q. You know what those solids are, don't you?
A. For the most part, yes.
Q. They are Kaopectate?
A. Right.
Q. Table salt?
A. Right.
Q. And Miracle White?
A. Right.
Q. Are you familiar with the manufacturing processes that are carried on at the Pennsylvania Industrial Chemical Corporation plant at West——
A. No.
Mr. GONDELMAN. Objected to as incompetent and irrelevant and beyond the scope of direct. Of course, he has already said no.
The COURT. It has already been answered. He said he is not.
Q. Have you had any experience with Chester Engineers in the analysis of industrial waste?
A. Yes.
Q. Can you think of any industry that might produce waste that had a profile similar to that contained in Defendant's Exhibit B?
Mr. GONDELMAN. Objected to as irrelevant, incompetent and immaterial, nor was the witness offered for that purpose.
Mr. THORNBURGH. He stated it came from detergents, Kaopectate and table salt. I want to find out what else it may have come from.
The COURT. I think that's okay.
Q. Is there any industry in your experience in analysis of industrial waste, is there any industry which produces waste with a profile similar to that which you found on Exhibit B?
A. The aluminum industry perhaps.
Q. The aluminum industry. Any other industry?
A. It would depend on—of course, aluminum—this analysis, if you had a malfunctioning water treatment plant, would produce this.
Q. Then there are two things, the aluminum industry or a

malfunctioning water treatment plant. How about an industry that used a substantial amount of aluminum chloride?

A. It would be likely that they would produce that analysis.

Q. Comparing this, your code No. 230–1–D, set forth on Exhibit B—I'll show you the big one—with this one which is Government's Exhibit No. 7, code 230–1, the pH factor is exactly the same, isn't it?

A. Yes.

Q. The alkalinity on Government's Exhibit 7 is about four times that on your Defendant's Exhibit B.

A. Yes.

Q. It is 1,070 on Exhibit 7 and 260 on Defendant's Exhibit B. The aluminum is about the same, isn't it, 40.4 on Government's Exhibit 7 and a flat 40 on Defendant's Exhibit B. The chloride is about 50 times higher—in fact, it is 50 times higher on Defendant's Exhibit B.

A. Yes.

Q. It is 20 on Government's Exhibit No. 7 and 1,000 on Defendant's Exhibit B. The sulphates are 262 on Government's Exhibit 7 and 200 on Defendant's Exhibit B. The total solids on Government's Exhibit No. 7 is 12,898, and on Defendant's Exhibit B, 3,953. Suspended solids, 140 on Government's Exhibit No. 7 and you didn't run a test for suspended solids on Defendant's Exhibit B.

A. No.

Q. Looking at Government's Exhibit 7 and again based on your experience in the analysis of industrial waste, are there industries, in your experience, which would produce a waste with that kind of profile?

A. Yes.

Q. What industries would those be?

A. Again my main attention turns to aluminum. It would have to be something or some industry concerned with aluminum, and again it would be the plants I mentioned before. It could be a water treatment plant, it could be an aluminum plant. If you forgot the aluminum it would be like from any other industry. Any plant would fit into that.

Q. If you forgot the aluminum would that be a typical industrial waste sample, would you say?

A. It is certainly possible.

The COURT. Does this refer to the concrete or iron pipe?

Mr. THORNBURGH. This is the concrete pipe. Defendant's Exhibit B relates to that.

I have no further questions.

REDIRECT EXAMINATION

By Mr. GONDELMAN:

Q. Could that exhibit also be, and does it contain, matters which would be other than industrial waste?

A. Oh, certainly. It could contain—well, the sulphate is from ordinary tap water which I wouldn't consider industrial waste. The hardness, ordinary tap water will have at least that and probably four times that amount. The pH is what would be, may be found in tap water. Tap water will run from 7 to 9.0. This is 8.8. The alkalinity is perhaps a little high, but it could be—well, ordinary tap water would be maybe 200 alkalinity.

Q. How about the iron?

A. The iron, .4 isn't unusually high. In some tap waters, although .3 is the limit, you may find .4.

Mr. GONDELMAN. That's all, sir.

RECROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Do I understand you to say that your expert opinion of code 230–1, the large placard that is in front of you, is that that profile of chemical water analysis is of ordinary tap water or could be of—

A. No. Excluding the total alkalinity, the aluminum, and perhaps the high solids, the rest of the analysis could be ordinary tap water.

Q. Exclusive of those three?

A. Yes.

Q. The high alkalinity, the aluminum and the high solids?

A. Yes. I mean, everything else would be—

Q. How many other things are there?

A. There is hardness, there is iron, manganese, although that is perhaps a little high, but there are some tap waters or well water certainly has it, chlorides, sulphates, and that's about it.

Q. From your knowledge of water analysis, you would ap-

prove of tap water that had 0.1 parts per million manganese in it?

A. The rule of health organizations says you can drink up to 1 part, as many as 4 parts now. If you get a higher concentration the solution will turn to a purple color, but .1, I don't think, is toxic and you will probably find it in well water.

Q. Well water?

A. Most probably if you go into city waters where they have treatment plants, most probably the manganese would be substantially less.

Q. How about 140 parts per million of suspended solids?

A. Of course, this wouldn't be found in the tap water.

Q. You wouldn't find that in tap water?

A. No.

By Mr. GONDELMAN:

Q. Mr. Helwick, on that exhibit that Mr. Thornburgh just asked you about, there is shown total solids, 12,898.

A. Yes.

Q. Volatile solids, 753.

A. Yes.

Q. Fixed solids, 12,145.

A. Yes.

Q. And then suspended solids.

A. Yes.

Q. Would you tell us what the volatile solids and the fixed solids are in relationship to the liquid in which they were found?

A. Well, to determine the total solids you at first essentially evaporate the solids. You take out all the water and whatever solids remain would be the total solids. Then at 600 degrees C you burn these solids. Whatever is remaining would be fixed solids. The difference between the total solids and the fixed solids are the dissolved solids. They could be carbonates, which is an inorganic material, or they could be organic material.

Q. How about their solution or dissolving in the mixture from which you evaporated all of this? Are they in that mixture and dissolved or in a solution like Exhibit E? How are they found?

A. In that particular sample the only thing that would tell you whether it was dissolved in that particular solid would be the suspended solids. Fixed and volatile couldn't tell you.

By Mr. THORNBURGH:

Q. You didn't perform these tests in your mixture of Miracle White, Kaopectate and salt?

A. No, sir.

[Side bar conference.]

Mr. GONDELMAN. If the Court please, I call Mr. Dore as for cross-examination. He is an employee of the District Engineers office, Corps of Engineers, Department of the Army, and the Plaintiff is the United States of America in this case. I call him pursuant to a subpoena which I issued to Colonel West to bring with him all regulations promulgated by the Corps of Engineers under the Act of March 3, 1899, together with all rules and regulations which have been posted relating to the provisions of Section 407 of said Act as well as 411 and 419 of said Act, together with a list of all places where such regulations have been posted, conspicuous and appropriate places for the information of the public, forms and applications for permits to deposit any kind of refuse matter whatever, any description whatever, into any navigable water of the United States, and specifically the Monongahela River.

The COURT. You can't call him as for cross-examination. That's clear.

Mr. GONDELMAN. He is an employee of the Plaintiff.

The COURT. The rules don't permit that. They can't be an employee. He has to be an officer.

Mr. GONDELMAN. He is an officer. Should I get Colonel West, who is officially an officer? He is in charge of the rules and regulations.

The COURT. You served the subpoena on him to bring certain documents. There is no reason to call him as for cross-examination. He is going to produce whatever the documents are.

Mr. GONDELMAN. I will reserve the right if he is hostile.

The COURT. If he is hostile, but the Federal Rules of Criminal Procedure—actually the Rules of Civil Procedure—I presume it is the same—they have to be managing director or something like that. Will you stipulate that there were no permits obtainable for——

Mr. THORNBURGH. No, I will not, and furthermore, I object to this witness being offered absent a showing that any application was made by the Defendant for a permit for the Act requires, specifies, that the obtaining of a permit is a defense

and without a showing that a permit was obtained no testimony given by the Corps of Engineers' agent would be admissible.

The COURT. Well, his argument is apparently since this information was not posted—you are not claiming lack of knowledge of the——

Mr. GONDELMAN. I am claiming under the regulation applicable to 407 the Engineers had a duty to inform the public and have since this year been informing the public.

The COURT. You are saying the Corps of Engineers owed a duty to tell the people the law?

Mr. GONDELMAN. Right, under 419 they had a duty to post this information and, in fact, I will show they did in certain instances not relating to the discharge of refuse, I will show that the regulations and the public notice given by the Corps of Engineers related solely, by their own publications, publications of the United States of America, to that area involving impeding navigation. I will further show that Mr. Johnston, vice-president of the Defendant corporation, when he applied for the permit to have a water intake and to build a barge and to build a fence and do other things, some of which inured to the benefit of the United States, or they would have lost their dam on the river, asked whether any other permits were required and was told they weren't. In fact, they had none.

The COURT. I am going to sustain the objection to the total line of testimony because, as I see it, whether you could or could not get a permit is irrelevant and whether you knew or did not know that you needed it is irrelevant. Relevant proof would be, I think, if they didn't know they were putting that stuff in the water, but not that they didn't know that they weren't allowed to put pollutants in the water.

Mr. GONDELMAN. Then I would like, out of the hearing of the jury, and with Your Honor, to mark and identify each and every exhibit for the Court of Appeals. I want to protect the record by making an offer. I have their documents.

The COURT. We will order all the documents this man has produced sealed.

Mr. THORNBURGH. We will stipulate as to what he has produced.

Mr. GONDELMAN. You are stating that the fact that the Corps of Engineers has never had a permit program in Pittsburgh and the fact that we asked for it doesn't make any difference?

The COURT. That's right. I think that's the way the courts have ruled consistently.

Mr. GONDELMAN. Every court decision that Your Honor is taking as a ruling concerns not one offer of evidence. They are motions to dismiss. There is no evidence in the record. There has never been an offer to prove specifically what has occurred in this district which has lulled this Defendant into the position of being here today on a criminal charge.

The COURT. I am perfectly satisfied that there was no way that you could have gotten a permit. As to that I am perfectly satisfied.

Mr. GONDELMAN. But I think I have to be able to prove this. The jury is going to decide in a vacuum—

The COURT. You wouldn't stipulate there is no way that they could have gotten a permit to put the things in the water?

Mr. THORNBURGH. For the purposes of the record in the face of Your Honor's ruling—No, I won't.

The COURT. We will seal the exhibits. I don't know what the jury is going to do if things don't result as you hope. I am going to reserve any ruling ultimately on a judgment of acquittal. I might be able to change my mind. If I thought it made a difference you wouldn't need the jury to help you. I would grant judgment of acquittal, but since I am presently of the opposite way of thinking, I think it would only confuse the issue to the jury if I gave it to them and then told them to ignore it, so we will mark what he has and we will seal it. Everything he has got in that briefcase we are going to seal.

Mr. GONDELMAN. All right.

The COURT. I will direct the clerk to keep it. It will be available for my review or for the Court of Appeals.

Mr. GONDELMAN. The position you are putting me in trying this case is trying this case to a jury in a total vacuum. Under Rule 26 of the Criminal Rules of Evidence the technical laws of evidence have been referred to as archaic and leading to injustice. This is what is happening here. You are asking a jury here to pass upon a thing as if this Defendant did an illegal act without having any knowledge whatsoever of the background, the circumstances, the reputation and the conduct of the Government of the United States itself.

The COURT. I don't really honestly believe that is a matter of defense that you couldn't get a permit or that they didn't give notice that you needed a permit or somebody told him, "These are all the permits you need." I can be totally wrong, of course,

and it might be totally wrong to reconsider. I think that is a matter of law, not for the jury.

Mr. GONDELMAN. I also want to be on the record the fact that in connection with Mr. Lisanti's testimony, Mr. Lisanti would have testified, if permited, that the discharges and the specific analysis on every matter which is related to this, and these informations, are absolutely within the prescribed limits of the Pennsylvania Water quality standards.

The COURT. Yes, but I have overruled that.

Mr. GONDELMAN. But it is not on the record and I want it to be, that every matter discharged by this Defendant is within the prescribed regulations of the Commonwealth of Pennsylvania which have been adopted by the Government of the United States, and that therefore insofar as this actually relates to our dumping, the cases refer to pollutants and refuse interchangeably. As to the Government's own regulations this is not a pollutant.

The COURT. We can list all of this kind of thing later without the jury sitting there and this man sitting there.

Mr. GONDELMAN. All you are going to let me ask this man here is just who he is and if he is here pursuant to subpoena——

The COURT. I want you to ask him if he brought with him, pursuant to subpoena, certain documents requested in that subpoena, at which time I will order them sealed by the clerk.

Mr. GONDELMAN. But we must also understand in connection with what he brought, the things he didn't bring. He didn't bring a scrap of paper relating to any promulgation——

The COURT. You can ask him if he brought everything on that subpoena and if there were some things that were not brought because they were not available.

Mr. GONDELMAN. Can't we do this out of the hearing of the jury?

The COURT. We will excuse the jury and we will do it your way.

Mr. GONDELMAN. Then we are going to get to Mr. Johnston, who is going to show——

The COURT. Are you going to make an offer before you call him?

Mr. GONDELMAN. I am so totally confused. You tell me what you want me to do.

The COURT. You ask this man if he brought the documents pursuant to subpoena and he can answer yes. We will take them

and seal them and then if you want, out of the presence of the jury, to itemize them we will be able to do it for the purpose of showing that some documents weren't in existence. They weren't there.

Mr. GONDELMAN. I am anticipating, I think correctly, Your Honor's ruling on Mr. Johnston. I would say the Defendant isn't going to have any evidence because Your Honor has precluded every scrap of evidence which could possibly show that this Defendant hasn't violated this law.

The COURT. I hope I haven't done it.

Mr. GONDELMAN. You have effectively done it.

The COURT. I don't know what Mr. Johnston is going to say. Mr. Johnston is going to say if that stuff got into that effluent they were not aware of it and didn't know it.

Mr. GONDELMAN. Of course he is not going to say that.

The COURT. That's a defense.

Mr. GONDELMAN. I don't think that's a defense.

The COURT. I think that's the only defense really, that they didn't know it.

Mr. THORNBURGH. I gather Mr. Johnston is going to testify again as to the inability of the company to obtain a permit, and I would interpose the same objection there and I am suggesting, if it is the appropriate time——

The COURT. I would make the same ruling.

Mr. GONDELMAN. But the point just made shows the dilemma the Defendant is in. You are saying that Mr. Johnston isn't going to be permitted to testify that he knew it but he also knew he was allowed to do it.

The COURT. The only way he is allowed to do it is to have a permit.

[End of side bar conference.]

[John P. Dore, a witness called in behalf of the Defendant, having been duly sworn, testified as follows:]

DIRECT EXAMINATION

By Mr. GONDELMAN:

Q. State your full name.

A. John P. Dore.

Q. Where are you employed?

A. United States Army Engineers, District Office, across the street in the Federal Building.

Q. How long have you been so employed?

A. For over thirty-one years.

Q. Is the Corps of Engineers delegated by Congress the enforcement of the Refuse Act?

Mr. THORNBURGH. Objection. I think it is quite clear what counsel and the Court agreed upon as far as this witness's testimony. I ask Mr. Gondelman to proceed accordingly.

The COURT. I don't know who is delegated the authority to enforce the Refuse Act.

Q. Who promulgates the rules and regulations under the Refuse Act?

A. I believe it is the Secretary of the Army as spelled out in the law.

Q. Is that delegated to the Corps of Engineers?

A. Chief of engineers.

Q. Chief of engineers?

A. Yes, in the district office of the Corps of Engineers.

Q. You have been employed in the district office of the Engineers of the United States of America for thirty-one years?

A. That is correct.

Q. I show you what has been marked Defendant's Exhibit F. Except for the fact that it is addressed to Colonel West—he is the Chief Engineer?

A. Yes, that's right. He is our district engineer.

Q. Without reading it aloud, but just read it to yourself, and I ask you if you have seen that subpoena issued by my office before?

A. Yes, I have.

Q. Pursuant to that subpoena have you brought all of the documents which are referred to in that subpoena to court today?

A. All that I have available over there.

Q. If they weren't available you didn't bring them?

A. That is correct.

Mr. GONDELMAN. With Your Honor's ruling, I think that's all I am allowed to ask.

The COURT. Mr. Odderson, I want you to take those documents which were produced pursuant to subpoena and I want you to seal them and retain them for the records in this case. I think we can examine them at some later time because we know he has brought what he has and he says what he didn't have he didn't bring.

Mr. GONDELMAN. I realize that, Your Honor——

The COURT. You mean you think there might be something you want to use?

Mr. GONDELMAN. Not that I want to use, but I want to supplement this package by showing it to this witness who can identify it and it can be also sealed. I want to have a complete record.

The COURT. You have a perfect right to do that.

Q. Mr. Dore, I show you a document and ask you if that is also an official document of the Corps of Engineers?

A. It is identified in the left-hand corner.

Mr. THORNBURGH. Your Honor, I object to these questions and ask that an answer not be received on the basis of the agreement made at side bar.

The COURT. Is that a document that isn't among the ones that have been produced?

Mr. GONDELMAN. Yes, and I asked him to produce them all and I happen to have one that I think is important.

The COURT. Is that a part of the official documents put out by the Corps of Engineers?

The WITNESS. Yes, sir, it is. It is identified as such.

The COURT. All right. That can go with the rest. Don't staple it because that's the one you produced. Let the hooks remain around the rest of them. Do you have any others?

Mr. GONDELMAN. Not for this witness. I have no further questions.

Mr. THORNBURGH. No questions, Your Honor.

The COURT. The reason for that procedure, so you will understand what went on, is that there were certain documents which were subpoenaed which the defense, entirely within their rights, culled because they thought they would be of some assistance to them in this case. I felt they had nothing to do with this case. I excluded them. However, as I told you in the beginning, if I make a mistake, a higher court can correct it, so we are going to keep them. If it becomes relevant a higher court can look at them and decide whether I was right or wrong. That is the purpose of this.

Mr. THORNBURGH. I would like an offer.

(The jury left the courtroom.)

The COURT. We want to know what you intend to prove by the witness. That is the purpose of an offer of proof.

Mr. GONDELMAN. I understand that, Your Honor. I am going to try to make such an offer of proof. I offer to prove by Mr. Johnston that Defendant's Exhibit A, which shows the plan and which has already been admitted in evidence, contains the discharges from about twenty houses which abut the Defendant's property, that it is an open sewer, that it runs down onto the Defendant's property, that it had been an open sewer until the Defendant bought the property, that the Defendant then put a concrete pipe in along its property when the street was vacated by Jefferson Township so that it then went into a closed sewer, but it is nevertheless a sewer which does contain street and surface water and houses.

The COURT. That's a proper offer and that will be admitted.

Mr. GONDELMAN. I further propose to show that Mr. Johnston, as vice-president of the Defendant corporation, that commencing on November 16, 1949, he has been in constant contact with the district engineers of the United States Engineers' office, the new Federal Building, Pittsburgh, Pennsylvania.

The COURT. Since 1949?

Mr. GONDELMAN. Yes, sir.

The COURT. They didn't put that building up until later.

Mr. GONDELMAN. In 1969 the new Federal Building was this building, but things sometimes change. Now it is across the street and we are in the old Federal Building, but back then it was the new Federal Building because the old one was down on Fourth Avenue and Smithfield Street. They tore that down. In 1949 he was in constant contact with the district engineers' office, secured a permit for the construction of a barge landing and a water intake along the Monongahela River at the plant site here in issue, that such a permit was granted by the Corps of Engineers, that the public notice that was circulated by the Corps of Engineers only advertised that it was a matter to interested parties to state objections as to the proposed work from the standpoint of navigation, and that was all that the Corps of Engineers in this district had been concerned with.

The COURT. In the erection of a wharf?

Mr. GONDELMAN. In the erection, in this case, of a barge landing and a water intake. All that is is a pipe in which the water flows.

The COURT. Water intake is where you take the water out of the river?

Mr. GONDELMAN. Yes, but certainly it was a permit which we had to secure from the Corp of Engineers, Department of the Army, and we did on November 30, 1949, secure such a permit.

The COURT. Do you have any objection to that, Mr Thornburgh?

Mr. THORNBURGH. Yes, Your Honor. I have an objection as to relevancy. I don't see that there is any relevance to a so-called Section 10 permit which relates to navigational obstructions and a permit——

The COURT. What is the relevancy?

Mr. GONDELMAN. The relevancy of that is that it was either then in 1949 or perhaps in 1951 or '2 when Mr. Johnston was again in contact with the Corps of Engineers. It has relevancy on two points. It shows that the Corps of Engineers knew we were there, knew we had applied for a permit and had permit forms and applications. There seems to be some thought on Your Honor's part that when Congress passes an act, you must file for a permit, everybody is supposed to run out and find out what kind of a permit to file or what kind of application form to make up.

The COURT. I'll agree. That's my idea.

Mr. GONDELMAN. I know of no instance where the Government of the United States says you must file something that they don't give you ninety-five forms to be made out in seventeen triplicate copies to fourteen different organizations. The fact is Mr. Thornburgh says you ask for it and the fact is Mr. Johnston asked the gentleman in charge of this district office whether any other permits were required in the construction operation of that plant. They asked for a barge permit, water intake, and they had other permits that were asked for that I will go into, and he was told no other applications—and, in fact, if he would have asked for an application for the matters which we are charged with here, the Corps of Engineers would have told you you were out of your mind, you didn't need one. That is what they told Mr. Johnston. That is part of the offer. He did ask for a permit.

The COURT. Permit for what?

Mr. GONDELMAN. The Corps of Engineers inspected the plant. They inspected the construction of the water intake and the barge landing and Mr. Johnston then asked the Corps of Engineers' officer in charge—I think his name was Hardy—

"This is our operation. Are we all right? Do we need any other permits or are there any other things required of us?" He was told no. At that time there were discharges into the river.

The COURT. Did he ask specifically for a permit to discharge industrial waste into the river?

Mr. GONDELMAN. The industrial wastes were being discharged into the river. The Corps of Engineers were there. The question asked of the Corps was, "Is there anything else we need?" The answer was no. In fact, you see the difficulty with trying this case and the frustrations that you and I and Mr. Thornburgh know, but the jury is never going to know that if you would have asked for a permit to discharge water into the Monongahela River you would not have received one because there were none.

The COURT. Why didn't you ask Mr. Dore that?

Mr. GONDELMAN. Because you wouldn't let me.

The COURT. As to whether or not you could get a permit——

Mr. GONDELMAN. You told me that it is irrelevant——

The COURT. Put him back on.

Mr. GONDELMAN [continuing]. That there was not a permit for the discharge of industrial waste.

The COURT. You couldn't have gotten one if you asked for it.

Mr. GONDELMAN. I want to know if there were application forms for it.

The COURT. I'm not sure this helps you. If Mr. Johnston says he asked for a permit to dump industrial waste in the river, I will let you ask that. I am not going to go through a bunch of other kinds of permits totally irrelevant.

Mr. GONDELMAN. The purpose of the other kinds of permits is to show how aware of the operation of the Defendant's plant the Corps of Engineers was so that when he asked if there were any other kinds of permits required of the Defendant, the answer was no.

The COURT. The only comment to that, if the man told him, "No, you don't need any other kind of permit," he was wrong.

Mr. GONDELMAN. He was right as this law operated until March of 1971.

The COURT. As I read the law nobody could operate it that way.

Mr. GONDELMAN. We will try to show that in connection with my offer, Your Honor.

The COURT. We are not going into a wharf and water intake thing and all that kind of stuff which has nothing to do with our case.

Mr. GONDELMAN. For the purpose of showing the dealings with the Corps of Engineers.

The COURT. What will that establish?

Mr. GONDELMAN. It will establish the knowledge of the Corps of Engineers so when they told us we didn't need a permit they knew what they were talking about. This isn't like I am out in the woods——

The COURT. You told me you couldn't get such a permit.

Mr. GONDELMAN. The fact is there was never one issued in their district. Do you want me to ask Mr. Dore?

The COURT. You can ask Mr. Dore if they could have gotten one if they asked for it.

Mr. GONDELMAN. That's a back door way of doing it. I prefer my way.

The COURT. I don't want to listen to a whole bunch of stuff.

Mr. GONDELMAN. I want to ask him if there had ever been in this district——

The COURT. You can ask him that.

Mr. THORNBURGH. I would ask your respectful reconsideration of this point because the Act says that the permit must be sought prior to the discharge in question.

The COURT. I am going to tell the jury that I am letting them have this information. In my opinion, it doesn't make a bit of difference. I want to try to correct Mr. Gondelman's frustrations. I am going to let him ask that question. This is what I am going to let you do in lieu of asking all this other stuff.

Mr. GONDELMAN. The fact is, since you are asking about asking a permit before the discharge, you see, the fact is that a permit was sought, unless you are going to now define——

The COURT. No, no. You can ask Mr. Johnston if he ever sought a permit. I have always said that.

Mr. GONDELMAN. And then if he says he asked the Corps of Engineers if he needed a permit for the discharge and they said no and Mr. Dore says they didn't have permits, they didn't issue permits, what are you going to submit to the jury?

The COURT. I will submit it for such use as they think important. I don't think it has anything to do with this case.

Mr. GONDELMAN. You are going to tell the jury that we sought a permit, the Government didn't have one, but they are indicting us for a crime?

The COURT. Yes.

Mr. GONDELMAN. That helps. This is my record. On November 5, 1951, Commonwealth of Pennsylvania, Department of Forests and Waters, Water and Power Resources Board, Harrisburg, File No. 10717; issued a permit to the Pennsylvania Industrial Chemical Corporation to construct a barge landing and water intake along the Monongahela River roughly complimenting——

The COURT. That certainly has nothing to do with this case.

Mr. GONDELMAN. I am making my offer.

The COURT. Do you object to that, Mr. Thornburgh?

Mr. THORNBURG. Yes, I would.

The COURT. Sustained.

Mr. GONDELMAN. On the 2nd of May, 1952, Corps of Engineers, United States Army, permitted the Defendant to place derrickstone along their property as protection against further erosion immediately upstream from the abutment at Dam No. 3. They had no objection to the work. They approved the work. This is also again to show the Corps of Engineers was on the Defendant's property, knew exactly what was going on and did not in any way complain of lack of permit, offer a permit or any such thing.

Mr. THORNBURGH. I'd object to that.

The COURT. Sustained.

Mr. GONDELMAN. October 13, 1955, Corps of Engineers of the United States Army, upon recommendation of the Chief of Engineers, and under provision of Section 10 of the Act of Congress approved 3 March, 1899, entitled An Act Making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for Other Purposes, they were permitted to replace piling and repair existing terminal structures and so forth. There is an entire list of matters. It also states "that all parts of the work herein authorized shall be entirely removed from the waterway without expense to the United States and the waterway cleared to the satisfaction of the district engineer." It doesn't give any rights in the waterways, of course, but that is cited there.

Mr. THORNBURGH. That is navigational matter again, Your Honor, and I object.

The COURT. Sustained.

Mr. GONDELMAN. July 23, 1956, Mr. Johnston wrote to the district engineer stating that he had discussed with a Mr. M. V. Harrington of their office on July 19, 1956, a proposal to install a river water inlet suction well and strainer assembly along the left bank of the Monongahela River immediately above the dam at Lock No. 3. This would be on the land side of the harbor line, and so forth. It was at this time when we were installing the intake water system at the Defendant's plant, I believe, that Mr. Johnston specifically asked whether there was any need for a permit to discharge into the river and was told no.

The COURT. I am going to permit him to say that. The rest of it, if Mr. Thornburgh objects, I will sustain it. If he doesn't object, I won't. That's it. Mr. Thornburgh?

Mr. THORNBURGH. I do object.

The COURT. All right. Sustained.

Mr. GONDELMAN. On July 5, 1957 the Corps of Engineers wrote to my client referring to the matter of extending a fence along the north property line to the normal pool shore line on the left bank of the Monongahela River. This was approved, it was approved by the Corps. They inspected it. They were on our property in 1957.

Mr. THORNBURGH. Objection.

The COURT. Sustained.

Mr. GONDELMAN. June 2, 1964, United States Army Engineer District, Pittsburgh Corps of Engineers, at that time in the Manor Building, wrote to our client regarding the installation of a barge cable anchor behind the abutment wall of Dam No. 3, Monongahela River. There was a drawing on the installation of the barge cable anchor. It was approved. They were informed when it was installed, and the matter was inspected by the Corps on our property, referring again to the knowledge of the Corps of Engineers as to what was going on in Jefferson Township by the Defendant.

Mr. THORNBURGH. Objected to.

The COURT. Sustained.

Mr. GONDELMAN. I want to show on June 23, 1965, the public notice of the United States Army Engineer District, Pittsburgh, states that in connection with any matters which they advertised, that all interested parties are invited to state any objections they have to the work from a standpoint of navigation.

That is all the district engineers cared about until just before the presidential proclamation.

Mr. THORNBURGH. I object.

The COURT. Sustained.

Mr. GONDELMAN. I want to show in connection with proving the unavailability of a permit——

The COURT. We are going to let Mr. Johnston say that.

Mr. GONDELMAN. What Mr. Johnston says and what I can prove out of the one side of the mouth of the United States is two different things. That is a public notice issued by the Corps of Engineers, United States Army, dated February 3, 1954, listing fees to be charged by the Corps of Engineers, and at no point is there a fee for discharging water into the river. It is only concerning navigation. April 14, 1954, there is also a list of fees that they set, but there is no fee schedule for a permit for what we were doing.

The COURT. In 1953 and 1954?

Mr. GONDELMAN. Of course, and right up through 1971.

The COURT. That doesn't prove anything.

Mr. GONDELMAN. I can ask Mr. Johnston, after I prove it out of their mouths. I want to prove it out of the mouth of the engineers, not Mr. Johnston. He is an interested party.

Mr. THORNBURGH. The question of fees is not relevant.

The COURT. Permits might be free. I don't know. We will let him put the two documents in.

Mr. GONDELMAN. You say they might be free. It would be nice if somebody would say so.

The COURT. Since I am not likely to try any cases in the future——

Mr. GONDELMAN. I am only trying to give you my viewpoint as I stand here before you. June 12, 1956, to the Commonwealth of Pennsylvania, Department of Health, in conjunction with the application to operate an industrial waste treatment plant at Jefferson Borough, plant of the Defendant, the "surreptitious" actions of the Defendant are shown by the advertisement in the newspapers required under the state law advertising all interested persons were invited to partake and participate in the state proceedings. This is in 1956 and that is when the waste treatment plant was authorized.

The COURT. I don't even know that any of this was going on in 1956 and I don't care.

Mr. GONDELMAN. We must assume 1899 was before 1956.

The COURT. Do you object to that?

Mr. THORNBURGH. I do. This relates, as Your Honor knows, to August 7, 1970.

Mr. GONDELMAN. Pursuant to the public advertisement to the people of the Commonwealth of Pennsylvania, also citizens of the United States, a permit was issued relative to industrial waste to the Pennsylvania Industrial Chemical Corporation which permit, No. 1803, states that subject to certain conditions of which there are seventeen, the only one which the Defendant was told he was not subject to is sixteen, which says—and this is an exemption from the State, the only agency really concerned with pollution until Washington found out about it—that the person wishing a permit, the permittee, shall secure any necessary permission from the proper Federal authority for any outfall or industrial waste treatment structure which discharges into or enters navigable waters and shall obtain from the State Water and Power Resources Board approval of any stream crossing or change of natural stream conditions coming within the jurisdiction of the said Board.

Mr. THORNBURGH. You can put that one in. The State told them they didn't have to go to the Federal Government to get a permit.

Mr. GONDELMAN. That's exactly right. The State told us we didn't have to go to the Federal Government, but we got a permit from the State. You said I can put this one in?

Mr. THORNBURGH. Yes.

Mr. GONDELMAN. Fine.

The COURT. If there is no objection.

Mr. GONDELMAN. On June 25, 1965, the Sanitary Water Board of the Commonwealth of Pennsylvania issued an industrial waste permit, No. 464123, to the Defendant, which is basically the same as the other which regards what we had to take out of certain waters and which also contains the fact that—on one page toward the end of the permit, that permit says, "You are subject to certain conditions attached hereto," and then it says, one, two, through fifteen and seventeen. Sixteen is the one that I was reading from.

The COURT. Sixteen says this permit doesn't permit you to put anything into the water unless you get a Federal permit.

Mr. GONDELMAN. If you will look at the end of the permit it says, "You are subject to the seventeen conditions." The sixteen conditions are referred to, but not No. 16.

The COURT. Where is that? Go ahead.

Mr. GONDELMAN. I'm not offering that one at this time.

Mr. THORNBURGH. What is the number of that one again?

Mr. GONDELMAN. It is 464123, I think, July, 1965.

Mr. THORNBURGH. And you are not offering that one?

Mr. GONDELMAN. No, sir. On November 11, 1970, in connection with the permit program——

Mr. THORNBURGH. Now that one clearly, Your Honor, is past the date we are talking about. I can't see any need to go any further with that.

Mr. GONDELMAN. It is past the date and this is why this whole history is so important and thus relevant. It is a letter from Colonel West to the Defendant, and it says, "Dear Mr. Ostermeyer, It has been reported to me that your property at West Elizabeth, Pennsylvania, is a source of discharges or deposits of refuse matter into navigable waters of the United States. Such discharges are unlawful and subject your company to legal action, unless done pursuant to a permit issued by the Department of the Army under the Refuse Act, 33 U.S.C. 407." This is the first time in the history of the United States since 1899 that the Corps of Engineers told people they needed that permit. In addition, and this is what is important to Your Honor in connection with another ruling that went on the record. "In this connection, public law 91-224"—this is from the Corps of Engineers—"the Water Quality Improvement Act of 1970, approved 3 April, 1970, 84 Statute 91, requires that with a written application the applicant provide a certification from the Commonwealth of Pennsylvania that the discharge or deposit will not violate applicable water quality standards. You should contact Mr. Howard G. Luley, Regional Sanitary Engineer, Region 5, Pennsylvania Department of Health, State Office Building, Pittsburgh, Pennsylvania, to obtain such certification." In the extract they show for the first time what information is required of a potential applicant in an application to be filed with the district engineers. Defendant wrote to the district engineers and then following that I would show that the—this is in part of the restricted matters that Your Honor has—that for the first time in 1971 when the informational bulletins are issued by the Corps of Engineers they show permits for work and structures in and for discharges or deposits into navigable waters. The ones in 1939, 1965, only

my permits for work and structures in navigable waters. There is nothing about discharges or deposits.

The COURT. The concept, this goes back to the basic difference in our view of the law. In my opinion, whether the law was enforced at a prior date or not, it was the law. I don't think any agency, executive agency of the Government, had any right to say, "We aren't going to enforce this." That is why I am excluding the fact that there was no permit, that you couldn't get one. If I am wrong on that, then I am wrong in every ruling practically that I have made.

Mr. GONDELMAN. That is what is frustrating, of course.

The COURT. True, but still that is my view and I can only call them as I see them.

Mr. GONDELMAN. But the other question, you see, comes to what are we here for? Are we trying to fine a Defendant under a misdemeanor or criminal statute and tag the Defendant with a criminal offense when, in fact, now——

The COURT. I absolutely guarantee you that we are not going to brand anybody with a scarlet A or anything——

Mr. GONDELMAN. If the jury convicts, that's what we are branded, whether you think so or not. I also want to show, so that we understand what the permit program is or whether there was one, that for the first time by the documents that have been issued to me, May, 1971, is the first application forms. How anybody could have gotten a permit without knowing that the United States Government wanted all this——

The COURT. They couldn't. What they could do is desist from throwing pollutants into the water.

Mr. GONDELMAN. Your Honor used an interesting term there, "pollutants."

The COURT. Whatever these things are.

Mr. GONDELMAN. If we want to find out whether the Defendant was throwing——

The COURT. "Industrial waste" is the term.

Mr. GONDELMAN. It is "refuse" under the Act.

The COURT. All right, "refuse."

Mr. GONDELMAN. The question is whether a definition of refuse is very easily defined.

The COURT. We are going to make a stab at it.

Mr. GONDELMAN. I want to show in May, 1971, the Corps of Engineers first put out one form and then amended it and put out another form which are the applications for a permit to

discharge or work in navigable waters and their tributaries. It is the first time for such a form, and I don't know how any defendant could have possible made an application and could have known that they wanted all of this data.

The COURT. I understand what you are saying.

Mr. THORNBURGH. I object to all those things that——

The COURT. If you think you will want to appeal, put those in an envelope and seal it and we will keep those, too. Sustained.

Mr. GONDELMAN. I also want to show, in connection with the comment of Your Honor that all you had to do was cease and desist putting the matters into the streams, that under the present state of technology what you are saying is that every industrial concern along the river—and I know you talk about Congress in its wisdom, but Congress isn't alway very wise.

The COURT. I know, but nobody made me powerful enough to reverse the acts of Congress or I might do it to several.

Mr. GONDELMAN. It is not a question of reversing the acts of Congress. The question is, when you come into a court of law and the effect of an act of Congress is, in fact and in truth and in substance, that to take the interpretation of the Justice Department and follow what Your Honor just said is to say then every industrial concern must stop. On the other hand, the comingling of all these statutes and the reading of them in any sense and harmony says that if you read what Congress is now doing in connection with what they did in 1899, which nobody knows what they really did then, you get a harmonious reading of the statutes which permit the economy and the ecology to work side by side.

The COURT. If you're right, I can see you are going to make a national reputation for yourself.

Mr. GONDELMAN. I am not interested in a national reputation.

The COURT. I just don't think you are right. You know the ground rules. Do you want those things sealed? We have this industrial waste permit issued by the Commonwealth of Pennsylvania back in——

Mr. THORNBURGH. Your Honor, I am going to object to that on the grounds that anything that the Commonwealth of Pennsylvania issued, if it was a carte blanche permit to dump anything into the river, is wholly irrelevant to this proceeding.

The COURT. Are you going to object to that?

Mr. THORNBURGH. Yes, I do.

The COURT. All right. Sustained.

Mr. GONDELMAN. Are fee schedules going in?

The COURT. Yes, fee schedules are going in. Mr. Johnston can testify that he could not get a permit, not that the Corps of Engineers said everything was all right when they were on the premises.

[John P. Dore, having been previously duly sworn, was recalled and testified further as follows:]

DIRECT EXAMINATION

By Mr. GONDELMAN:

Q. Mr. Dore, you testified you have been employed for thirty-one years in the district engineer's office.

A. Yes, sir.

Q. In those thirty-one years, sir, do you know whether the Corps of Engineers has ever issued a permit for the discharge of industrial waste into the Monongahela River where such discharge did not interfere with navigation?

A. To my knowledge, no.

Mr. GONDELMAN. I have no further questions.

CROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Dore, has the Corps of Engineers ever received any application, to your knowledge, for a permit to discharge industrial waste into the Monongahela River?

A. No.

Q. Have they ever received any application from the Pennsylvania Industrial Chemical Corporation to discharge waste in the Monongahela River?

A. No.

Q. Have they ever received an application from the Pennsylvania Industrial Chemical Corporation to discharge waste in the Monongahela River on August 7, 1970?

A. No.

Q. Did they ever receive an application from the Pennsylvania Industrial Chemical Corporation to discharge industrial waste into the Monongahela River on August 19, 1970?

A. No.

By Mr. GONDELMAN:

Q. What area does the District Corps of Engineers cover that you work for? What area is that?

A. The water shed of the Ohio River down to New Martinsville, West Virginia, about 25,000 square miles. That includes the Allegheny and Monongahela River and lesser tributary streams.

Q. Within your geographic area have you received an application from any industrial concern in that 25,000 square miles?

The COURT. It has been answered. He said no.

Mr. GONDELMAN. No. That was addressed to PICCO.

The COURT. I thought you asked him whether he had ever given it to anybody?

Mr. GONDELMAN. No. I asked him if he had ever given permits, and Mr. Thornburgh asked him if he had ever received applications for permits.

Mr. THORNBURGH. I asked him and he said no.

Mr. GONDELMAN. No, with respect to PICCO.

Mr. THORNBURGH. I asked him——

The COURT. Let's save time. Ask him.

By Mr. GONDELMAN:

Q. The question is, in the thirty-one years do you have any knowledge of an application from any industrial concern in the 25,000 square miles covered by your Corps of Engineers having been applied for to discharge industrial waste into the Monongahela, Allegheny or tributaries?

A. No.

[William D. Johnston, Jr., a witness called in behalf of the Defendant, having been duly sworn, testified as follows:]

DIRECT EXAMINATION

By Mr. GONDELMAN:

Q. State your full name, sir.

A. William D. Johnston, Jr.

Q. Where do you live, Mr. Johnston?

A. I live in Mount Lebanon, 99 Standish Boulevard.

Q. Are you married, sir?

A. Yes, sir.

Q. Do you have a family?

A. Wife, one child, one grandchild.

Q. How old are you?

A. Fifty-eight this year.

Q. Mr. Johnston, what is your occupation, sir?

A. I am a chemical engineer. I am vice-president of en-

gineering with the Pennsylvania Industrial Chemical Corporation in Clairton, Pennsylvania.

Q. How long have you been so employed?

A. With Pennsylvania Industrial Chemical, for twenty-seven years.

Q. If my arithmetic is right, that is back to about what, 1944?

A. '44, right.

Q. Were you employed by Pennsylvania Industrial Chemical Corporation when it established its plant in Jefferson Township?

A. I was.

Q. Would you tell us when that was, sir.

A. The property was purchased or the commencement of the purchase was in 1949, early in 1949, and it was gradually added to over a period of time.

Q. Without giving us specific details, Mr. Johnston, were you the agent or the officer at Pennsylvania Industrial Chemical Corporation who would have had contact, say, with the Corps of Engineers?

A. I was, as chief engineer.

Q. You don't have a permit, a Federal permit—limiting it now to Federal—Federal permit to discharge effluent or water into the Monongahela River, do you?

A. None existed.

Q. When you say, "none existed," what do you mean by that?

The COURT. Your question was, do they have one, and he said none existed. I assume he meant he does not have one.

The WITNESS. We do not have a permit. We have applied for a permit.

Q. When was that?

A. The application has been underway since December.

Q. What year?

A. 1970.

Q. Did you at any time have any conversation with a member of the Corps of Engineers as to whether or not the Defendant PICCO—incidentally, what do we call the Defendant?

A. PICCO.

Q. PICCO. Did you have any conversation with a member of the Corps of Engineers of this district regarding whether PICCO was required to have a permit to discharge water into the Monongahela River?

Mr. THORNBURGH. I object to that question unless it relates to a period prior to August 7 or August 19, 1970, the time that the discharge is charged here. Anything after that would be irrelevant.

Mr. GONDELMAN. It would be far in advance of that. It would be 1956.

The COURT. You may answer that yes or no. Did you have a conversation——

Q. Did you ever have a conversation with a member of the Corps of Engineers as to whether or not PICCO required a Federal permit to discharge water into the Monogahela River?

A. Yes.

Q. When was that conversation?

A. In the fall of 1949, at the time we applied for a permit to build the pier, barge landing and water intake.

Q. Do you remember the name of the individual and his position with the Corps of Engineers?

A. I can't be sure of that because it was somebody in the office. At that time the district engineer was Colonel Hardy.

The COURT. You can't say it was Colonel Hardy you talked to?

The WITNESS. I said it was not Colonel Hardy.

Q. It was not?

A. Right.

Q. Do you recall who it was?

A. Not without referring to some pretty old notes.

Q. Do you remember what the person's position was?

A. One of the associate engineers or assistant engineers in the Pittsburgh district office.

Q. In the District Corps of Engineers' office?

A. That's right.

Q. What were you advised then by that individual as to whether or not the Defendant was required to have such a permit?

The COURT. As to that question you may ask him, I believe with all propriety, as a result of that conversation what, if any, steps did you take.

Mr. GONDELMAN. I will ask that question.

Q. I hope you will understand it, sir. As a result of the conversation with someone of the Corps of Engineers' office regarding whether you did or did not need a Federal permit what, if anything, did you do about getting a Federal permit, and if nothing, why?

A. We did not apply for a non-existent permit.

Q. You say "non-existent." What do you mean?

A. There was no permit at that time that was necessary for that type of discharge.

The COURT. Of course, that answer is stricken because whether or not one was necessary is the very question that we are going to have to pass on. I ask you to disregard it as to whether somebody told him that none was necessary. That is a question for you ultimately and for me first. That he didn't apply for a permit as a result of his conversation with that man is a perfectly proper thing.

Mr. GONDELMAN. All right. We have that.

Q. Prior to April, 1971, had you ever seen a Federal application form for a permit?

A. No.

Q. To your knowledge, was an application form in existence prior to April, 1971?

Mr. THORNBURGH. Objection, Your Honor. This witness isn't competent to testify to that.

The COURT. I don't know how he would be since 1899.

Q. All right. Since 1944, when you became employed at PICCO, until 1970, to your knowledge, was there an application form issued by the Government of the United States for a Federal permit for discharge of industrial waste into a river?

A. There was not, neither at Chester where we had a plant, at Clairton, Pennsylvania, where we have a plant, at West Elizabeth or Jefferson Borough where we have a plant, nor was there any at Baton Rouge, Louisiana.

CROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Johnston, prior to the discharge testified to in this courtroom on August 7, 1970, did you or anyone else on behalf of Pennsylvania Industrial Chemical Corporation apply to the Corps of Engineers for a permit to make such discharge?

A. We did not.

Q. Prior to August 19, 1970?

A. We did not.

Q. Your answer is that you didn't?

The COURT. In other words, you didn't apply?

The WITNESS. We did not apply. That is correct.

Q. Were you aware of the requirement in the Rivers and Harbors Act of 1899 that before a discharge of refuse be made

into a navigable water of the United States that an application for a permit to make that discharge be sought from the Corps of Engineers? Were you aware of that?

A. I was.

Q. Your testimony is that notwithstanding that awareness you made no permit application?

A. Right, because we did not discharge refuse.

Q. Just a moment.

Mr. GONDELMAN. The witness can explain his answer.

A. We were not discharging refuse.

The COURT. That is why he didn't apply for a permit.

Q. That was your opinion.

A. That is correct.

Q. Your opinion was you weren't discharging refuse.

A. That's correct.

Q. It wasn't because some associate engineer in 1949, twenty-one years earlier, had told you you didn't need a permit then. Is that right?

A. It was because we had a state permit to do what we were doing.

Q. You testified that in your opinion you weren't discharging refuse.

A. That is correct.

Q. I thought you told Mr. Gondelman that an associate engineer in the Corps of Engineers had told you twenty-one years earlier that you didn't need a permit anyway.

A. That is correct.

Q. Which reason is it that didn't apply prior to August 7 and August 19?

A. Both reasons. It is the same reason.

Q. One because you weren't discharging refuse and one because the Corps said you didn't——

A. It didn't require a permit from the Corps of Engineers. We had one from the State of Pennsylvania.

Q. Prior to August 7, 1970, did you give any consideration to seeking a permit from the Corps of Engineers to make that discharge?

A. Not to make that discharge, no.

Q. With respect to August 19, 1970?

A. The same answer.

Mr. THORNBURGH. No further questions.

By Mr. GONDELMAN:

Q. I show you, Mr. Johnston, what has been marked Defendant's Exhibit G and ask you if you can identify what those exhibits are.

A. These were public notices that were issued by the Corps of Engineers, Pittsburgh District Office, covering fees for issuance of permits.

The COURT. Dated when?

The WITNESS. Dated 14 April, 1954.

Q. And the second page of that?

A. The second page—actually, the first one was a notice dated 3 February, 1954, which was put out for general comment and upon receipt of comment the final issuance or the final permit fee schedule was issued 14 April.

Mr. GONDELMAN. If the Court please, I offer in evidence Defendant's Exhibit G.

The COURT. Admitted.

[Whereupon Defendant's Exhibit G was admitted into evidence.]

Q. Mr. Johnston, I don't think I asked you this. How does this water get in and out of your plant? Just briefly and quickly, not with too much detail, but what happens to it?

The COURT. You know we are on redirect.

Mr. GONDELMAN. I realize that, but I ask leave to reopen. I have not asked this question. I think it is important.

The COURT. All right.

A. Part of the water which comes through the plant is river water taken from the Monongahela River immediately upstream from Dam No. 3 which lands on PICCO property. The balance of the water which is used in the process comes from public water sources and is either from the formerly Monongahela Valley Water Company or now South Pittsburgh Water Company or from Mountain Water Supply or Westmoreland Water Authority. These waters are used in several ways. They are used as coolants in which case they are merely used to cool heat releasing equipment, or they are used as washing agents for contacting and dissolving soluble material in the aqueous phase. The water also originates from condensation of steam which is used as a distillation aid and in the production of vacuum through steam jet ejectors.

The COURT. This is really a new phase which really wasn't covered by your offer. I am not going to preclude you. We will take it tomorrow morning at ten o'clock.

[Whereupon the hearing was adjourned until Tuesday, June 29, 1971.]

JUNE 29, 1971.

[William D. Johnston, Jr., having been previously duly sworn, resumed the stand and testified further as follows:]

REDIRECT EXAMINATION [CONTINUED]

[Preceding question was read.]

By Mr. GONDELMAN:

Q. Will you pick it up from there and take the water through your plant as it comes out in both outlets, the two foot concrete pipe and the six inch pipe.

A. The water that issues from the two foot diameter public sewer originates as river water and also as water that has been used in washing an aluminum chloride polymerization catalyst system and contains aluminum chloride in solution. It also at that juncture where the streams meet contains the miscellaneous surface semi-sanitary waste and, to some extent, sanitary waste from a group of six to eight houses which are adjacent to but not on the property of PICCO at and near Madison Avenue. The aqueous phase that issues from the so-called six inch pipe comes from the distillation area. As I indicated earlier, the water there comprises water condensed during the distillation, water condensed from steam jet ejectors, water separated from the bottoms of storage tanks which results from moisture picked up from the air and also moisture picked up in contact during distillation and processing. The two streams that I mentioned as far as process streams are concerned, one from the A-poly, so-called, goes through a separating system which is, in effect, an API—it stands for American Petroleum Institute—basic design of water and oil separator used in petroleum-chemical industry where the oils and other non-soluble materials are separated from that aqueous phase. The aqueous phase from the other side, so-called B-poly, comprises, as I said, the contact washing liquids from the B-poly

operation and from the distillation and tank bottom drainage, and that also is treated by being put through a further separating system comprising a series of tanks to minimize the amount of oil that is carried ultimately to the separator. At the entrance to the separator or immediately before the final separator in order to preclude formation or carry-over of emulsions which form between oil and matter something like mayonnaise and milk, it is necessary to add sulphuric acid to adjust the pH because emulsions are quite persistent at high pH levels. Furthermore, it is necessary to bring the pH down to meet state requirements in a river as far as pH level is concerned. The acid that is added at that point ahead of the separator then lowers the pH, permits the emulsions to break and in the separator the oil and water phases are separated by gravity settling and the oil is skimmed off along with any other floating materials which are raised by the additional use of a flotation system which was pioneered under state observation for this type of separator. The effluent that flows from that unit, that final separator, then goes down over the bank through the six inch pipe, so-called, and into the river, and the combination of the two streams have had in excess of 98 per cent of the pollutants removed from them, as prescribed by state requirements, and the effluent is of quality suitable for discharge into the river in accordance with the state requirements.

Mr. THORNBURGH. Your Honor, I ask that that portion dealing with state requirements—I move the answer be stricken as not within the realm of consideration of this proceeding.

The COURT. That is descriptive of the procedure, the process. It doesn't have much to do with this case. We are not at all concerned with what the state standards are. We are concerned with a Federal statute which will be described to you in my charge.

Q. You say that 98 per cent of the pollutants are removed by your water treatment plant?

A. That is correct.

Q. I show you, Mr. Johnston, what has been marked Defendant's Exhibit A and ask if you can identify what is shown on that exhibit?

A. This is a design of a continuation and more or less regularization of the open trench sewer that existed at the time we bought the property which picks up surface and semi-sanitary

and some sanitary drainage from Madison Avenue between the tracks of the Pennsylvania Railroad, Charleston Branch, and the Monongehela River. Since this was somewhat undefined and was running free down the street at the time we purchased the property, we confined this by putting in two box culverts or collecting culverts at the sides of the street, ran those together into an open concrete box trench which covers approximately three-quarters of the length of that street, and into which some of the cooling water is dumped from the process, and then it goes into a 24 inch diameter concrete pipe which is buried and which emerges as you have seen on the pictures through the side of the bank.

The COURT. In this testimony as of what time are you speaking?

The WITNESS. This was designed, Your Honor, August 19, 1952. This was in advance of the operation of this plant.

Q. So that the culvert you described has been there since 1952?

A. That's right.

Q. Would you take my pen and mark on the exhibit where the houses are that have been referred to?

A. The houses are not on the drawing. They are what amounts to really west, up Madison Avenue from the plant property on both sides.

Q. You indicated the left-hand corner of the drawing?

A. Left and right-hand corner. Actually, the upper right-hand corner, but actually up on either side. Madison Avenue from Second Street to the river has been vacated by the city for private use except that they have access, they have a water line and they require access to the river for the snow, and the Corps of Engineers also requires access down Madison Avenue, which is granted, to service the abutment of the dam.

Q. And so the houses then for the jury's information would be off of the exhibit from the left-hand corner going off Madison Avenue?

A. That is correct.

Q. Could you tell the Court and jury what the boxes shown on this exhibit are in the left-hand corner?

A. Those are concrete collecting basins which permit the settling out of gravel, general debris from the unpaved street. This street is not paved. It is a township secondary street and they merely act as collecting stations where such debris can be

separated from the water flow and the debris then cleaned out by shoveling it out to keep it from getting into the underground piping. They are indicated in Section CC, if this is of interest, as a general cross section view of them.

In other words, this drawing does show a cross section of the catch basins. Is that what you would call them?

A. That's right.

Q. Does street water also flow through that pipe line?

A. Any water that comes down Madison Avenue comes through that. That includes surface drainage from storm, snow melt, the washing liquids from the homes because in this area of Jefferson Borough there is no—nor anywhere else—dedicated sewage system and as such everybody relies upon sanitary facilities in the form of septic tanks, and naturally with the septic tank system you don't put either laundry or sink wash water through the septic tank if you can avoid it, so the standard practice, remembering that this area was developed and some of the houses are at least that old, in about 1900, the common practice is to dump any wash or laundry drainage out to the street, so that also is a part of what flows into this system.

Q. Have you by observation been able to tell whether or not laundry detergent waste water flows through that system, and if so, how?

A. Yes. Every Monday morning those gutters run white coming down to the two box culverts and, of course, continuing on down to the river bank.

Q. In addition to what flows from those houses you said something about what is discharged into that system by the Defendant. Would you tell us specifically what that is?

A. Yes. This is river water which is pumped through minor cooling uses and is used to keep the flow moving in that sewer generally because of the fact that we have a rather sluggish flow with minimal quantities of surface water flowing in it during other than rain or snow conditions. In order to keep the soap suds and so on, miscellaneous debris and whatever, moving on down through that sewer, we maintain one pump that keeps that sewer system cleaned out to avoid problems that might otherwise plague us.

Q. Are there any chemical discharges from your process that go into that sewer?

A. Yes. The wash water, after it has been treated in an API separator at the A-poly is discharged into that, and this con-

tains the aluminum chloride covered by our permit from the state.

Mr. GONDELMAN. If the Court please, I offer in evidence Defendant's Exhibit A, which has been previously identified. You have seen this.

The COURT. Hearing no objection, it is admitted.

[Whereupon Defendant's Exhibit A was admitted into evidence.]

Q. The industry in which your company is engaged, Mr. Johnston, when did it come into being by reason of technology?

A. In the early 1920's. Actually, the industry initiated really with the use of naphthas, crude oils, coke oven light oils and similar materials, so-called drib oils and holder oils from gas-making operations, all of which contain unsaturates which could be polymerized to form hydrocarbon resins. The Barrett Company was one of the earliest in this country. Although the technology had been known in Germany prior to World War I, it was not practiced here. We were incorporated in 1920 and went into this type of business in about 1928.

Q. The plan which you operated at Jefferson Borough was in operation from what date?

A. It started into operation in 1956. Prior to that time, while we had the property, it was being used primarily as a raw material storage area for bulk crude materials received by barge, which is why the Corps of Engineers' permit antedates the starting of the plant.

RECROSS-EXAMINATION

By Mr. THORNBURGH:

Q. Mr. Johnston, as I understand your testimony, the industrial wastes that are dumped out of the plant into this A-poly line are diluted by other wastes that come from the residential community that you have testified to?

A. That is correct, and by river water also.

Q. So that by the time they reach the discharge point, the pipe that was referred to in the picture, the wastes from the operation of the plant are in a solution with a number of other sources that——

A. Discharges, yes, not the wastes. We remove the wastes.

Q. You have testified, I think, that the only reason you dump the waste in there is to keep the soap suds moving, in effect.

A. No. That is the reason for the river water.
Q. The river water?
A. That is correct.
Q. Is to keep the soap suds moving?
A. Right.
Q. Is that only on Monday that the river water is put in there?
A. No, no. It is not only on Monday that the soap suds go in there either.
Q. They are in there every day?
A. Yes. People don't wash every day, but obviously since this comes from sinks and bathtubs, et cetera——
Q. Have you ever been inside any of these houses?
A. Yes. We own two of them now, one of which has been torn down. We have been buying these as they came on the market.
Q. There are seven of these houses?
A. At last count, I think six.
Q. And you have been inside two of them?
A. That's right.
Q. One of them is now torn down?
A. Right.
Q. So you have been inside the other one?
A. Yes.
Q. Was it occupied in August of 1970?
A. Yes.
Q. By a family?
A. Yes, by an employee.
Q. Did you ever see them do their wash?
A. Yes. I know him personally.
Q. Did you ever see them do their wash?
A. No. I never stayed around to see the washer in operation.
Q. Do you know if they have a washing machine?
A. I am not certain of that.
Q. Have you ever been in any of the other houses?
A. Yes.
Q. Have you been in all seven of them?
A. No.
Q. Did you ever see washing machines——
A. I have stepped in the ditches.
Q. Have you ever seen washing machines in them?
A. No.

Q. Do you know whether they have washing machines?

A. I have no idea.

Q. So the process waste or process liquids are dumped into the pipe out of the plant operation.

A. These are discharged as a steady flow. There is no dumping.

Q. Steady flow?

A. Right.

Q. That is around the clock?

A. Twenty-four hours a day.

Q. Twenty-four hours a day. The river water is put in there——

A. Twenty-four hours——

Q. [continuing]. Only to wash out the soap suds.

A. Twenty-four hours a day.

Q. Twenty-four hours a day?

A. Right.

Q. Do the soap suds come down twenty-four hours a day?

A. I haven't watched that.

Q. But that is the only reason the river water is put in there?

A. No. It is put in there to keep the soap suds and any other solids moving to avoid problems with A-poly, the 24 inch concrete pipe.

The Court. Are you using "soap suds" to actually mean soap or just as a descriptive term?

The Witness. There is very little soap used today, Your Honor.

The Court. That is what I mean.

The Witness. What I mean is the suds that result from whatever detergent is used, whether it be soap or one of these other detergents, beer, possibly.

The Court. Beer?

The Witness. Yes.

Q. People use beer to wash their clothes in Jefferson Borough?

A. No, but they dump it in the gutter.

Q. On Defendant's Exhibit A, Mr. Johnston, is that the discharge pipe from the process carried on at the plant?

A. No longer.

Q. No longer?

A. That's right.

Q. Well, was it in August of 1970?

A. No.

Q. This map is not accurate as of August of 1970?

A. The map is accurate. The line is still there. That's all the map shows.

Q. Where is the indication on this map of the pipe that dumps the discharge from the process?

A. A continuous discharge comes through this 12 inch concrete line here.

Q. What is this pipe?

A. That pipe is a formerly used river water return line. You recall that we have a 12 inch suction line from the river, and this was returning that water. When it became so bad about six years ago we stopped using river water for cooling. We are now using a cooling water which requires a closed return system, and that pipe was abandoned but not removed.

Q. So that this pipe here is the one that indicates where the——

A. That's correct.

Q. And this indicates that the maximum capacity of that pipe is a thousand gallons per minute. Is that right?

A. Right.

Q. And that is to take care of the maximum that would be in the outflow?

A. At the time it was designed it also was carrying cooling water from process equipment which has now been changed over to cooling tower water, a closed system.

Q. And that is a 12 inch concrete pipe?

A. That is correct.

Q. Going into a 24 inch pipe which eventually goes into the river?

A. That is correct.

Q. That line operates pretty near capacity. I think your testimony was that 900 gallons per minute are pumped into that?

A. No, nothing like 900 gallons a minute. The flow that you show on your exhibit—I forgot the number——

Q. There is no flow shown.

A. Oh, yes there is. You can see the water coming over——

Q. You mean on the picture?

A. That's what I said, yes. You can calculate what that is.

Q. From the picture?

A. Yes.

Q. What was the figure 900 gallons per minute that I thought you testified to?

A. I don't believe I testified to 900 gallons per minute.

Q. I am sorry. My apologies.

A. We had an original capacity through that line of 900 gallons per minute, but at the present time as you can see from that photo, it is somewhat less than 200 gallons a minute.

Q. That is coming out of the pipe?

A. The 24 inch diameter concrete sewer.

Q. The A-poly.

A. No. That's the 24 inch diameter concrete sewer. Oh, you call it A-poly.

Q. That's what Mr. Lisanti calls it.

A. Yes.

Mr. THORNBURGH. No other questions.

By Mr. GONDELMAN:

Q. Mr. Johnston, in the present state of technology, is it possible for you to operate a water treatment facility, taking river water and going through your chemical process, so that the discharge into the river would be pure 100 percent water, pure water?

Mr. THORNBURGH. Objection, Your Honor. What is possible under the state of technology is not relevant.

The COURT. You mean by distilling it or something like that? I don't understand your question. You mean, is there any way that you could do that?

Mr. GONDELMAN. Under the present state of technology.

The COURT. Will you rephrase your question since I don't understand it.

Q. Mr. Johnston, can you so treat water, some of which comes from the river, some of which comes from the tap and some of which comes from your plant, so that the discharge through the sewers described here would be 100 per cent pure water?

A. No.

Q. If you were required to do so, could your plant operate at all?

A. No.

Mr. THORNBURGH. Objection.

The COURT. That's sustained. It has nothing to do with the problem facing this Court.

Mr. GONDELMAN. I have no further questions.

[Side bar conference.]

Mr. GONDELMAN. At this time I would want the clerk to take the blue folder which I have here containing, I think, all of the

exhibits which I referred to in the original offer yesterday relating to Mr. Johnston's testimony, they being the specific exhibits which would——

The COURT. We will take them and order them sealed.

[End of side bar conference.]

Mr. GONDELMAN. If the Court please, the defense rests.

The COURT. Any rebuttal?

Mr. THORNBURGH. No rebuttal, Your Honor.

Closing Argument by Mr. Thornburgh.

Mr. THORNBURGH. Ladies and gentlemen of the jury, we have now reached the end of this case and I want, first of all, to thank you for your patience during this trial. I am aware that that patience has been taxed by the frequent conferences that we have had with counsel and the Court, objections, arguing, alike. Let me assure you that it is nothing unusual in cases that are hard fought on both sides. Both Mr. Gondelman and myself have sought to insure that you decide this case only on the basis of proper evidence, and that is what most of the delays have involved. That is, getting the Judge to rule on disputed questions and of admitting evidence for your consideration. For the delays, I am sure Mr. Gondelman and myself both apologize, but please understand that it was in terms of getting before you only that evidence which is competent and relevant in making your determination in this case.

Once again I have to remind you in my closing remarks I will be stating my best recollection of certain facts and evidence which you have heard. If I misstate a fact, you disregard it because it is your recollection that counts and not mine. You will receive your instructions on the law from Judge Teitelbaum, so no portion of my remarks should be considered on that score either.

I told you at the beginning of this case that it was not a very complex case. Now that you have heard all of the evidence I think I can still say to you that this is not a very complex case, that the important facts which the evidence points you to are clear and uncontradicted. I want now to take this opportunity to review those important facts with you so that they will be uppermost in your minds as you deliberate in this case.

You have heard that the Defendant, Pennsylvania Industrial Chemical Corporation, operated a manufacturing establishment in August of 1970 in Elizabeth Borough in Allegheny

County, where they manufactured various petrochemical resins based upon styrene, endene and other hydrocarbons. Clear and uncontradicted in this process a million pounds of soda ash per year is used, about a million pounds of caustic per year, about a half a million pounds of sulphuric acid per year and about eight thousand pounds of aluminum chloride per day. Also clear and uncontradicted, the waste from this operation after some treatment, to be sure, is eventually dumped into the Monongahela River through two discharge pipes owned by Pennsylvania Industrial Chemical Corporation and designated by them as the A-poly and the B-poly discharges. All of these facts were testified to by Mr. Lisanti, the paid consultant who PICCO hired to deal with their industrial waste problem.

You did not hear, I might add, any evidence that indicated that these discharges from either of these pipes were made up of Kaopectate or table salt or Miracle White, as the Defendant might suggest on the basis of the testimony yesterday of the Defendant's chemist, Mr. Helwick, and some of the tests that he stated he conducted over last weekend. In the final analysis, I think and I suggest to you, all three chemists, Mr. Watts, from the Allegheny County Bureau of Tests, Mr. Lisanti, and Mr. Helwick from Chester Engineering, in effect, all agreed that these discharges that were sampled were industrial wastes. Although the company's chemist said that those from one pipe, the A-poly pipe, might possibly contain household waste as well, there are other facts in this case that admit a little doubt.

It is uncontested that on August 7, 1970, David Nixon and Dr. John Zavodni, in the course of making a survey of river pollution, pulled their canoe alongside the A-poly discharge pipe, only they called it discharge 230. They took samples of that discharge being dumped out of the A-poly pipe and similar samples from the B-poly pipe, which they called sample 231. You will also recall that on August 19, 1970, two weeks later, Mr. Nixon and this time Thomas Young, a student of his, pulled alongside the discharges again and they repeated their sampling to provide two more samplings from these sources being dumped into the Monongahela River. Finally you will recall all of the samples were turned over to and analyzed by Michael Watts, Bureau of Tests, Allegheny County. Mr. Watts' analysis finally was turned over to the United States Attorney's Office and formed the basis of this case. Let's

look again at what those charges were and how Mr Watts' analysis bears them out

Count number one relates to sample 230–1 and charges PICCO with discharging iron, aluminum, chlorides and solids into the Monongahela River on August 7, 1970. Mr. Watts' analysis shows us that the sample contained, in fact, 0.4 per million of iron, 40.4 per million of aluminum, 20.0 parts per million of chlorides, and 12,898 parts per million of solids. That is what sample No. 230–1 contained in the Government's charge, count number one.

Count number two relates to sample 230–2 and charges PICCO with discharging iron, aluminum, chlorides, phosphates, sulphates and solids into the Monongahela River on August 19, 1970. The same discharge as count one, but a different date. Mr. Watts' analysis as set forth on Government's Exhibit No. 10 shows as follows: Iron, 1.2 parts per million; aluminum, 98.4 parts per million; chlorides, 132 parts per million; phosphates, .2 parts per million; sulphates, 270 parts per million; solids, 1,068 parts per million. That's count number two, August 19, 1970, at the discharge labeled 230–2 or the A-poly line. Try to keep those in mind.

Count number three relates to sample 231–1. That is the second line, the 6-inch pipe, the B-poly line, if you will. It charges PICCO with discharging iron, aluminum, chlorides, sulphates and solids into the Monongahela River on August 7, 1970, the first day the samples were taken. Mr. Watts' analysis shows us that the sample contained, in fact, iron, 1.4 parts per million; aluminum, 41.8 parts per million; chlorides, 36 parts per million; sulfates, 3,206 parts per million; solids, 28,782 parts per million. That's count number three, sample 231–1.

Finally count number four relates to sample 231–2, August 19. It charges PICCO with discharging iron, aluminum, chlorides, phosphates, sulphates and solids into the Monongahela River on that date. Mr. Watts' analysis of sample 231–2 shows us that the sample contained, in fact, iron, 2.2 parts per million; aluminum, 83.6 parts per million; chlorides, 540 parts per million; phosphates, 10.5 parts per million; sulphates, 9,768 parts per million; solids, 46,832 parts per million.

Ladies and gentlemen, I would submit that the charges filed by the Government find ample support in Mr. Watts' analyses. Let's remember back that Mr. Nixon and Dr. Zavodni also took one other sample on each day, August 7 and August 19,

so-called midstream samples 511–1 and 511–2. You may wonder why these were referred to at all in this case and I want to clear that up now. I will tell you that they were introduced into this case only to show you that in no case did the Government file charges with respect to substances being discharged into the river which were quantitatively less than what the river samples show the river already to contain. Although Mr. Watts' analysis of sample 230–1 showed 262 parts per million of sulphate to be contained in that discharge, the river sample that was taken on the same day, that is, at 511–2, shows that 267 parts per million of sulphate were present in the river, and there was no charge with respect to the discharge of those sulphates.

On the other hand, Government's Exhibit No. 12, being sample 231–2, showed sulphates of 9,768 parts per million being discharged from the B-poly pipe, while at the same time the river level was 258.4 parts per million, and the charge was included within the information filed against PICCO. These river samples, of course, obviously form no part of the charges and are not evidence of PICCO's violation of the Act.

On the basis of all of the other evidence produced, however, you must now decide, under Judge Teitelbaum's charge, as to the law. He will instruct you as to that, whether or not with respect to each of these four charges Pennsylvania Industrial Chemical Corporation is guilty of—in the words of the Act, and I am quoting, discharging refuse matter into what we have agreed is a navigable water of the United States. You have, through the testimony that has been adduced by the Government in this case, more than sufficient ingredients to make that determination.

As to matters of defense, let me anticipate as best I can what matters will be raised by Mr. Gondelman in his closing remarks to you. You have heard from time to time during this case frequent mention of permits to discharge and their bearing on this case is an important one. I expect that Judge Teitelbaum will tell you that discharges of refuse which would otherwise violate the law are permitted if and only if the dumper obtains a permit from the Corps of Engineers before he begins to discharge the refuse in question. We have no such case here. No such permit was issued with respect to the discharges of August 7 or of August 19. In fact, Mr. Johnston, the vice-president of PICCO, testified that he did not even

apply for a permit to discharge on either August 7 or August 19, and you do remember his reason. You remember that he said that in 1949, twenty-one years earlier, a man whose name he can't remember, a functionary in the Corps of Engineers, an associate engineer, I think he said, had told him it wasn't necessary. Well, I don't know whether PICCO was dumping anything into the river in 1949. Mr. Johnston testified the plant didn't even start up until seven years later, in 1956, so the engineer's advice might have been right, for all we know, but in any event, I suggest to you that to have relied on this supposed unofficial clearance given some twenty-one years later was no excuse for not seeking a permit clearly required by the law and, of course, it provides no defense to the charges in this case, but you have also heard this matter of permits is even more serious. It seems nobody pays attention to the law. You heard Mr. Dore of the Engineers testify that no permits had been received by his office from the Ohio River basin for discharges into navigable waters up until 1970. I ask you to remember, and I think the Court will instruct you that this Act, the Refuse Act, puts the burden on persons discharging refuse to seek and apply for a permit. It does not require the Corps of Engineers to ask for or solicit or search out those persons who might have to apply for a permit. With this in mind, I ask you is it any wonder with this kind of attitude that the Federal Government has of late undertaken an aggressive program to shut down discharges of industrial refuse into our rivers? If anything, this action is long overdue, ladies and gentlemen of the jury. It is long overdue.

There is one final matter I would like to get into before I close. Mr. Gondelman, during his cross-examination of Mr. Nixon, Dr. Zavodni and Mr. Young indicated that he might ask you to disapprove of their activities because the law gives them a chance to share in whatever fine might be collected from his client if you return a guilty verdict. He suggested that they were, in effect, bounty hunters. If he does ask you to disapprove their actions in his summation, I only ask that you consider very carefully this insinuation. These men, to be sure, had a motive in their activities, but it was not money. It was put simply and eloquently by Mr. Nixon. He said, "No, we weren't in this to make money. It was just our small way," he said, "just our small way to help clean up the rivers," and so it was then, and these two young teachers, Mr. Nixon and Dr.

Zavodni, and their student sidekick, Thomas Young, a Marine Corps veteran just back from Vietnam, deserve your fullest concentration on the results of their efforts which have been put into evidence over this past week. I am sure that you will give that evidence that kind of concentration.

So there it is, ladies and gentlemen. That's the Government's case. I want you to pay particular attention, even more so than to my remarks, to Judge Teitelbaum's instructions to you on the law. Consider all the evidence, and if it convinces you of guilt beyond a reasonable doubt, have no hesitation in finding Pennsylvania Industrial Chemical Corporation guilty on each of the four counts charged.

Thank you for your patience and for your attention.

[Side bar conference.]

Mr. GONDELMAN. I must ask Your Honor's indulgence in a matter which I overlooked and ask that I be permitted to incorporate a motion for judgment of acquittal which I neglected to do right after I rested.

The COURT. Under the rules you can make it just as well within the next seven days. There is no penalty.

Mr. GONDELMAN. I just wanted to have it on the record.

The COURT. I looked it up when I realized you had not done it. I think it is too late now. I looked it up.

Mr. GONDELMAN. I wanted to make sure I got it in as soon as I realized it.

The COURT. I don't think I can allow you to make it now, but I don't think you are hurt by it.

[End of side bar conference.]

Mr. GONDELMAN. Ladies and gentlemen, I, too, appreciate your attention in this case. Sometimes you wonder what we are doing. Sometimes I wonder what I am doing. Sometimes perhaps Mr. Thornburgh wondered because I think it is obvious to you that we are pioneering for there is not much precedent for what we are doing here and we are trying to get the law to you as we understand it. I will offer our evidence and present our case as fervently as I can for a client whose case is heard in Federal Court or any court because I think every case tried before a jury is an important case in the administration of American justice. I don't think any case where an injustice is done does anything but erode what is going on in the country and the world, and that is the right of people to live.

This is not a pollution case. I know you can't decide cases in a vacuum and you know there is all this talk about pollution. We are not being charged with polluting. This is a criminal case, something Mr. Thornburgh seemed not to tell you very much about. PICCO is charged with having committed a crime against the United States Government, United States of America. As such, the Government of the United States, under our system of justice, has the burden of proving each and every element of this offense beyond a reasonable doubt. That is sufficient for a defense, to create a reasonable doubt. We haven't just done that, but I want you to remember where the shoe stays throughout trial. The burden rests on the Government. The Defendant does not have to prove anything in the United States of America. In this country every defendant is presumed innocent until proven guilty by evidence which convinces you of that guilt beyond a reasonable doubt. We are not trying a pollution case. We are not trying an injunction. We are not trying a case to stop pollution. We are trying a criminal case brought, remember, under the Act of March 3, 1899. His Honor, Judge Teitelbaum, has the duty of explaining the law to you.

I submit to you, ladies and gentlemen of the jury, that you have the duty of sitting in a jury box later in the jury room and deliberating on a case with the law as it is given to you and with your own common sense and experience in applying that law. I told you when I opened that the Government and the democracy of the United States will exist so long as twelve people can retire to a jury room and bring in the verdict that makes sense under the facts as they are presented to you. I submit to you a verdict of guilty in this case would make absolutely no sense for the reasons that I will now go into.

First of all, there is no question in this case—and we could have shortened it considerably—we did. I offered to stipulate that the samples that were taken from the two pipes came from PICCO's plant. I stipulated that the chemical analysis of what is in those pipes is accurate, but remember this, you cannot, as Mr. Thornburgh did in his closing, compare river water in midstream—and every expert in this case so testified—to any sample that is taken from the PICCO plant because every expert told you that this analysis comes only after the rate of flow and the amount of water in midstream is known, and to make that analysis with what is taken directly from the discharge put into the stream you must know what the river flow

is and how much water there is going into it because it could approximate what is in midstream already, but at least the experts told you that you can't compare apples and oranges, and that's exactly what this is, and it is not even of the fruit family.

You will remember Mr. Watts. I said, "Can you compare 231–2 with 511–2?" He said, "Oh, no, you can't make that comparison. We are not offering this for a comparison," and you can't compare it because when that water goes into the river, without knowing the rate of flow and the amount of water—you heard the examples. If you put it into a small non-moving stream, certain things might be refuse, where if you put it into a fast moving stream, it wouldn't be refuse, so that I submit to you you cannot, when you go back to the jury room, say that what comes out of the discharge sewers of PICCO's plant stays in these quantities that you have here.

There were two other matters that I had to show you in order to make sure that you understood. I realize you are not chemists and I am not. When you take a look at some of the figures on here as to what is total solids, you might think that looks like a solid even though it is 46,000 pounds in one million pounds of water. Here is a total solid of 12,898. It might look impressing to you. Take the Defendant's exhibit. I didn't introduce this to insult your intelligence by showing you that salt will dissolve in water. Of course not. I introduced this to show you that this fluid in this jar contains 20,000 pounds of solids per one million gallons of water. That's what that exhibit shows you, so that you would have some ability to relate what is shown on these exhibits because, ladies and gentlemen of the jury, these exhibits have to be understood in their context. This exhibit does not show that there was 40,000 pounds of aluminum—if this is aluminum—pieces of aluminum in water. This exhibit shows you that there was added to water aluminum chloride, incidentally, a substance used in the treatment and purification of water, which we are charged with dumping into the river. Aluminum chloride is like sodium chloride. It is a salt. It dissolves.

When you look at this you find aluminum as if it is something separate. It is aluminum chloride and this exhibit is simply to demonstrate to you that when you talk about these substances you must understand what they look like in water because that's what we are talking about. I submit to you 20,000 pounds of

aluminum chloride, sodium chloride, any chloride, is a liquid state discharge and affects in no way the Monogahela River other than help clean it up some, because many of the matters that Mr. Thornburgh talked about, soda ash and caustic, are all used in cleaning up water.

Mr. THORNBURGH. I object to that. There is no evidence in this case that those substances are used to clean up water. Mr. Gondelman's testimony is not admissible.

Mr. GONDELMAN. Aluminum chloride is being used in water treatment plants.

Mr. THORNBURGH. He said many of the things I talked about like soda ash and caustic are used to clean up water.

The COURT. Let's limit it to aluminum chloride.

Mr. GONDELMAN. As we all know, Government's Exhibits 1, 2, 3, 4, 5, and 6 are photographs taken at my client's plant. We also know that the act under which Congress, in its infinite wisdom, in 1899—remember, we are trying, in 1971, to interpret what Congress in 1899 had in mind. Just think back. You don't decide a case in a vacuum, I told you. You decide it in the light of your own experience. In the lifetimes of all of us what has this country come from and to? It has gone from an agricultural community in 1899 to a highly industrial community in 1971. We are trying in 1971 to imagine what President McKinley and Congress had in mind, and to think that they were so bright and so clairvoyant that they could anticipate what this country would develop to and then pass a law that says that you shall not dump or throw or discharge or deposit refuse, any refuse matter of any kind of description whatever. I submit to you that you decide in 1971 in light of the industrial development of this country when you try to apply it to this Act, and remember, too, that it says—the Government hasn't yet told you that—"Any refuse matter of any kind or description whatever"—I am quoting from the Act of 1899—"other than that flowing from streets and sewers and passing therefrom in a liquid state."

It is my recollection—it will be up to you to remember it—I think perhaps Judge Teitelbaum remembers it differently. If he does, it is still your recollection. It is my recollection that everybody agrees—and I really don't see how anyone could disagree—that the matter flowing from this box in Government's Exhibit 6 is in a liquid state. It is certainly flowing in a liquid state. There is no question that Exhibit 3 shows ma-

terials flowing in a liquid state. Mr. Watts testified that the matters which he examined were in a liquid state. That is item number one.

I believe it is incumbent upon the Government to prove that this matter is not flowing from sewers and not flowing in a liquid state. Everybody agreed that these were sewers. The witness Lisanti, I believe, when the Government called him, testified that these were sewers. Watts, I think, testified they were sewers. I may be mistaken there. Everyone testified that they flow in a liquid state, so item number one, the Act says that you shall not discharge refuse—I don't know what refuse is. The Judge will explain it to you and you see if you know what refuse is. The Act says that you must not discharge refuse into navigable waters—no question about the Monongahela River being navigable—except that flowing from streets and sewers in a liquid state.

What is a sewer? A sewer—and you have to use common ordinary definitions. There is nothing before you that makes us think that Congress in 1899 defined sewers other than what Webster defines a sewer. Webster defines "sewer" as: "An artificial, usually subterranean conduit to carry off water and certain waste matter." Remember, this is a criminal case and therefore you must take, and I think Judge Teitelbaum will tell you, you must construe the statute and the words of the statute narrowly. You can't give them a broad and wide meaning. You must construe them as they are written. Black's Law Dictionary also defines a sewer. It says, "An artificial, usually underground or covered, channel used for the drainage of two or more separate buildings." There is testimony that there are more than two buildings on this property. I think, in fact, the Government's exhibits will show you that there are more than two buildings on the property, so you have sewers carrying water. We challenge the fact that there is waste material in it—for reasons which have been explained to you—through sewers discharged into a navigable water. The Act says that if it is carried from a street or a sewer and passes in a liquid state it is excepted from the operation of the Act altogether.

Mr. Thornburgh attacked Mr. Johnston's credibility on the fact that someone in the Corps of Engineers told him in 1949 that you did not need a permit to discharge water into the Monongahela River. I submit to you that there is ample corroboration of the fact that that's what the Corps of Engineers

would have told anybody. From 1899 until 1970, if you operated an industrial plant and discharged materials into a navigable stream, the Corps of Engineers would have told you that you don't need a permit.

Mr. THORNBURGH. I object to that, Your Honor. There is no such testimony in the record and I don't think that Mr. Gondelman should refer to things that are not in evidence in this case.

Mr. GONDELMAN. I tried not to interrupt Mr. Thornburgh, but the fact is I can argue every inference from the facts and testimony that I choose to argue, and I am arguing the inferences from Mr. Dore's testimony.

The COURT. I will cover that in my charge. I trust you have concluded that part of your argument.

Mr. GONDELMAN. Ladies and gentlemen of the jury, let's look at the exhibits and decide what the Corps of Engineers' attitude was. I have produced in evidence Exhibit G. Now, the permit that they are talking about, the permit that we are charged with not having because we couldn't get a permit, they say, is a permit to discharge refuse, whatever that is.

The COURT. Mr. Gondelman, I don't think there is any evidence that you couldn't have gotten a permit. There is evidence there were no forms and that none were issued.

Mr. GONDELMAN. I want the jury to look at an exhibit. How can I get the——

The COURT. Don't shout at me. I don't think there is evidence that you couldn't get a permit. There is evidence there were no permit forms. There is evidence that no permits were issued.

Mr. GONDELMAN. If the Court please, all I want to argue from Exhibit G is the fact that when the Corps circulated——

The COURT. You may argue that, but——

Mr. GONDELMAN. May I do that, Your Honor? May I argue from Exhibit G? That's what I just said I was going to do.

The COURT. You go ahead, but argue in a proper fashion.

Mr. GONDELMAN. I have tried, and if I haven't, I am sorry that you and I disagree.

I want you to look at Exhibit G. This is not an exhibit of the Defendant. This is an exhibit issued by the Corps of Engineers, United States Army, Office of the District Engineer, Pittsburgh District, 925 New Federal Building. This is not something that we manufactured. It is something the Govern-

ment sent out. I am not going to argue much about it. All I am going to ask you to do is to please look at this exhibit carefully and find out how much a permit would have cost to discharge refuse into the river. The reason I ask you to do that is that there is not a word on these two exhibits indicating fee schedules for permits, which shows that there is a fee schedule for a permit to discharge matter into the river, and the fact is that Mr. Dore did testify that in thirty-one years he does not know of a single instance where an industrial plant had requested a permit, he does not know of a single instance where the District Corps of Engineers issued a permit, and he does not know that there was in existence any application forms for a permit. That is something for you to consider as to whether or not a permit was clearly required by law for thirty-one years, at least. This is the Act of 1899. You figure it out. I don't think anybody is around whose memory will go back that far, but we certainly know from Mr. Dore, who was in that Engineers' office—the District Engineers covers 25,000 square miles, the Allegheny and the Monongahela Rivers and some of its tributaries. For thirty-one years in this country nobody has asked for a permit to put anything into navigable rivers and no permits were issued and no forms were there, and then suddenly in 1971 a Defendant is brought before you, not to ask him to stop doing what he is doing—there are reasons for that, I guess—but to have a jury of twelve convict that company of a crime, despite the fact that in thirty-one years it had never been done by the Corps or by anyone else. I submit to you that your common sense must apply because remember what I told you about a jury in a Federal Court or any court. What you decide—and you can't decide this case and say, "Well, that's a corporation. We don't have to worry about that." If you let the Government of the United States go along for thirty-one years without doing a thing in connection with a law that was passed in 1899 in an entirely different era come before you and say now, "Convict that corporation," I submit to you that what you are doing is eroding the sense of fair play and the sense of justice that has caused this country to proceed as it has through almost now two hundred years because when does it then come to the individual? See, you can't just sit there and think in terms of an individual, "They should do this." Remember, Mr. Johnston testified that it is technologically today impossible to take water out of a river, use it in a plant and then

discharge pure water into the stream. You think about the consequence of that. Will they go out of business? What happens? There is a balance here. There really is a balance between economy and ecology, and we have to argue ecology because it is all through the case and nobody has been able to talk about it.

We are charged with dumping refuse. We haven't gotten into what is pollution, what are pollutants, and as to the refuse and to the discharge of refuse, it is technologically impossible to remove all refuse from water in this broad interpretation. I submit to you when you interpret you must interpret it as it would have been thought of in 1899. I don't know how you are going to do that, but I suggest you must. I suggest you might interpret that Act as it was written as it applied to the economy as it existed and as has been applied by the Government of the United States for seventy years by not having applications or issuing permits, nor were they asked for, nor did any industry ask for them. You can ask yourselves why.

No one says it was clearly required by law. Mr. Thornburgh said in his closing that it is clearly required by law, so clearly required by law, according to his argument, that for thirty-one years not one has been asked for or delivered or sought by the Corps of Engineers. Is that clear to you?

In this country it has been the law that when you charge a person, corporation or anybody else, with a crime, that crime must be clear and definite, and it must be applied by the Government of the United States in a manner that is fair and equitable and just, and not seventy-two years later suddenly come in with a charge of a criminal violation of an Act that they have not sought to enforce for seventy years. I suggest to you, under the circumstances of this case, you have two ways in which you should acquit the Defendant of all four charges. One is this. The discharge from the plant is from a sewer in a liquid state. If that isn't a liquid state, I don't know what is a liquid state. Every expert testified so. These are sewers as defined by every dictionary you will look it up in. An underground conduit for the discharge of water and waste material. If this is waste material and it is flowing in a liquid state, it is excepted from the Act which says "Except for that flowing from a sewer in a liquid state."

Number two. I suggest to you that by the conduct of the Government of the United States itself, a conviction in this case

would be a blow to the administration of justice in this country. For twenty-two years I have practiced law as believing that we in this country really mean it when we say that we will proceed to justly and well apply laws to people equally, apply laws to people equally. In seventy-two years you have one Defendant charged in a criminal case——

Mr. THORNBURGH. I object to that, Your Honor. That is contrary to the evidence.

The COURT. There is no evidence as to that. That is contrary to the fact. The jury will ignore that.

Mr. GONDELMAN. In this district here, if the Court please, there have been no applications.

The COURT. Yes, but there have been other charges.

Mr. GONDELMAN. Not in these instances.

Mr. THORNBURGH. There have, and you know it.

Mr. GONDELMAN. Yes, there have been four brought, all at the first time.

The COURT. There have been other charges brought. That has nothing to do with the case. I don't want you to argue it.

Mr. GONDELMAN. There have been no applications in the office of the District Corps of Engineers for thirty-one years. Nobody has asked for an application. If they asked for one, there wasn't one. I suggest to you on that basis that your common sense and reason must indicate to you the unfairness in that. I am sure Judge Teitelbaum is going to tell you that whether there are permits, whether there aren't permits, doesn't make any difference under the law. If they make any difference to you, common sense and reason—does it make any difference to you when the Government is charged with the burden of proving a violation that a discharge occurred? I suggest to you that you must know that you are violating the law or at least the law must be violated knowingly, and yet no one in this district, 25,000 square miles, for thirty-one years has had the applications or asked for the applications. I think when you use your common sense and reasoning in that connection you will find that such a prosecution is unfair and unjust. There is no reason to try to convict a corporation of a crime in connection with what it is placing into a river if it has no effect on the ecology, and there is no evidence as to whether it does or not, so you can't really consider whether what is placed in the river has any effect on the ecology, except that Mr. Johnston did testify that what was placed in the river met state standards. You have that to go

by, and if it met state standards—he so testified in cross-examination by Mr. Thornburgh. He said specifically that he believed what the Defendant PICCO discharged into the river, he said, was not refuse. These are almost his exact words. He said it was not refuse because what was discharged in the river complied with state standards. I submit to you that that ought to mean something to you because he did so testify several times. This morning he, I think, testified again. Judge Teitelbaum will tell you whether it complies with state standards is not very important to you. I again say it is important for you to consider the fact that it does comply with the state standards. All of us are worried about ecology. It is difficult to try a case in an atmosphere that is permeated with an anti-pollution air that we are in now and everybody agrees with. I have to try to convince you that in this case an archaic statute does not apply in the fact situation before you. One way, I submit to you, to use your common sense and reason is for you to consider that if it does comply, as testified and as uncontroverted, if it complies with the state standards then it is really not a pollution case. It is simply a case charging the violation of an act of 1899 which prohibits the discharge of any refuse matter of any kind or description whatever. I think you can determine what the effect of that would be on the economy. You can determine whether or not if under technology today you cannot discharge pure water from mills, whether mills can operate and whether you want that. There must be a harmonious balance in this country, and we will reach it, where ecology will be implemented and the state standards are met, Federal standards are met, as opposed to the economy and the alternative of shutting down every plant that operates in this country.

Mr. THORNBURGH. I must rise to object to that, Your Honor. There is no evidence that such an horrendous result would occur in this case.

The COURT. If you want rebuttal——

Mr. THORNBURGH. Yes, I do.

Mr. GONDELMAN. I thank you, members of the jury. Obviously, I am finished. Mr. Thornburgh wants to say a few words.

Mr. THORNBURGH. I am not possessed with Mr. Gondelman's eloquence, ladies and gentlemen, but I like to think I am possessed with a little of the common sense that he is asking you

to exercise. For that reason I want to speak on just two or three points that he has made.

He has indicated to you that there is something sinister about enforcing an act which was put on the books in 1899. I suggest to you that we have endured and survived and prospered in this country with a Constitution that was put on the books over a hundred years before that, and there is nothing in the antiquity of a law that robs it of application or that requires you to disregard it simply because it is seventy-two years old. It is as fresh as today. It is as fresh as August 7 and August 19, 1970, when the Government charges this dumping took place.

Mr. Gondelman has suggested that perhaps these substances, this matter set forth on these charts here might well be a way of cleaning up the rivers. He has asked you to exercise your common sense. You exercise it in that regard because that kind of an argument, unsupported by any kind of evidence, is one that ought to be, in my mind, clearly excluded from your consideration. The idea of this Defendant making these discharges, hiring a consultant to deal with a water waste problem and then coming in to say, "Well, we were really just cleaning up the rivers," is patently ludicrous. Let me deal with the matter of so-called discharges in a liquid state from a sewer. Mr. Gondelman would have that read that anything that comes out of a pipe, in a liquid state cannot be refuse under the Act of 1899. Judge Teitelbaum will tell you what a sewer is, and it isn't just a pipe, and when we talk about the the liquid state, use your common sense again and ask yourselves, did Congress mean that only when you shoveled refuse into the river or dumped it in with a crane or drove a truck up to the river and dumped in solids, was that when you were violating the Refuse Act, or could you also violate it by having those solids—and you will remember the amounts of solids set forth on those examples—mixed in with a liquid discharge. Again I invite you to listen very carefully to what Judge Teitelbaum charges you with respect to this very limited exception to the 1899 Act.

With respect to the permits, it was my questioning that brought from Mr. Dore the fact that there had been no applications granted to anyone and no applications made for permits. I did that to show you that a law that clearly says that before refuse is dumped in a navigable water you must obtain a permit has been flouted ever since its passage in 1899 in this dis-

trict. Ask yourselves why, with a record like that, the Government has brought these criminal charges against this Defendant and others. The law is not made by the United States Attorney. The law is not made by the Corps of Engineers. The law was established by the Congress of the United States, yours and my representatives, in 1899, and it is as good today as it was then. You need only apply that law under the instructions that Judge Teitelbaum gives you. There is no burden on the Corps of Engineers to go around and shake the trees to determine who might need a permit. The Act puts the duty on the person who is doing the dumping to seek the permit, and no one has sought them and the time for inaction is over, ladies and gentlemen of the jury. It is later than you or I think.

Mr. GONDELMAN. I object to that argument, Your Honor. What Mr. Thornburgh or anybody else thinks is not evidence. This is not a pollution case.

The COURT. There is not going to be any surrebuttal, thank you.

Mr. GONDELMAN. It is improper argument.

The COURT. I think you provoked the argument by talking about ecology and by suggesting that my charge, whatever it might be, should be disregarded to those extents.

Mr. GONDELMAN. I take exception, of course, to those remarks at this time, too.

CHARGE OF THE COURT

Ladies and gentlemen of the jury, you have heard the evidence in this case and the arguments. It now becomes my duty to give you the instructions of the Court as to the law applicable to the case. You will recall that I gave you certain preliminary instructions at the outset of the case which were intended to guide you through these proceedings. I am now going to provide you with further instructions which I deem important to your deliberation. I will, undoubtedly, repeat certain instructions which I gave you earlier. That is merely because I feel that it is essential that you hear those at this time. You are not to single out any one instruction as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law as I state it to you. It has been suggested to you in closing argument that I might charge in certain ways, but that you

should be governed by certain other things. If you do that, you would be false to your oath. Your oath is to take the law as I give it to you without questioning whether it is a proper instruction or it isn't. You are to take the law as Congress has passed it without any question as to whether they should have passed it or not. That is a matter that neither you nor I can control. When a law is passed, that is the law and we must take that law as it is given, and any opinion that you might have or I might have as to the law, what the law ought to be, is not for you to consider. I say again, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that which I give you in these instructions, just as it would be a violation of your duty to decide it on something besides the evidence which has been produced in this case. The administration of justice in this country, through trial by jury, must always depend upon the willingness of each individual juror to seek the truth from the same facts and evidence and apply those facts to the rules of law as given by the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the information and the denials made by the not guilty plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as I give it to you and reach a just verdict regardless of the consequences. It is not for you to speculate what the effect of enforcing the laws of the United States would be. It isn't for me either. We must enforce them. You must not be concerned as to what the sentence might be if a guilty verdict would be returned because that is for me to determine and that isn't a part of the duty of the jury.

You will recall that the information in this case is in four counts. The different counts deal with two sources of discharge, each on two separate dates. I am going to outline these specific charges to you by reading them to you, but I wish to say this. Counts one and two refer to a concrete pipe of which you have heard and to discharge on August 7 in count one, August 19 in count two. As to counts three and four, they refer to a flow from an iron pipe, count three on August 7, count four on August 19.

The charges are as follows: Count One. On August 7, 1970, at approximately 2:02 p.m., in the Western District of Pennsylvania, the Defendant Pennsylvania Industrial Chemical Corporation, a Pennsylvania corporation, did unlawfully discharge and deposit from the shore and from its manufacturing establishment situate along the Monongahela River in West Elizabeth, Allegheny County, Pennsylvania, and from a concrete pipe approximately two feet in diameter, at approximately river mile 23.7 of the Monongahela left bank, certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides and solids into the Monongahela River, a navigable water of the United States, in violation of Title 33, United States Code, Sections 407 and 411.

Count Two is essentially the same except that the date is August 19, 1970, and the time is 3:23 p.m.

Count Three provides that on August 7, 1970, at approximately 2:07 p.m. in the Western District of Pennsylvania, the Defendant Pennsylvania Industrial Chemical Corporation, a Pennsylvania corporation, did unlawfully discharge and deposit from the shore and from its manufacturing establishment situate along the Monongahela River in West Elizabeth, Allegheny County, Pennsylvania, and from an iron pipe approximately four to six inches in diameter discharging effluent into a small wooden settling block from which water and refuse matter were discharged, at approximately river mile 23.7 of the Monongahela River, left bank, certain refuse matter, to wit, iron, aluminum and compounds containing these chemicals, and chlorides, sulphates and solids into the Monongahela River, a navigable water of the United States, in violation of Title 33, United States Code, Sections 407 and 411.

Count Four charges essentially the same thing except that the date is August 19, 1970, and the time is 3:39 p.m.

Counts One and Two deal with the discharge from the two foot concrete pipe on August 7 and August 19, 1970 respectively, and Counts Three and Four deal with the discharge from the four to six inch iron pipe on August 7 and August 19 respectively. You must consider each count of the information separately, and, based on the evidence concerning it, reach your verdict. Each count is a separate charge and each must be considered by you separately.

Of the two sections of the United States Code which are involved, Section 407 provides in its pertinent part that it shall

not be lawful to discharge or deposit from a manufacturing establishment any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state into any navigable water of the United States or into any tributary of any navigable water, from which the same shall float or be washed into such navigable water. It is provided that this section shall not be violated if the Secretary of the Army has permitted such deposit of any material above mentioned in the navigable waters. Unless, of course, a permit was granted, which it wasn't, it is violated.

Section 411 of Title 33 provides in its pertinent part that every person and every corporation that violates Section 407—that is the one I just read to you—shall be guilty of an offense against the United States. Then we must consider what the elements of the offense are. The first element, that the Defendant discharged and deposited from its manufacturing establishment any refuse matter of any kind or description; two, that it was discharged and deposited into any navigable water or any tributary of any navigable water from which it shall float or be washed into such navigable water; and three, that the refuse matter is not flowing from streets and sewers and passing therefrom in a liquid state.

I must therefore define certain of these terms to you. First, it has been stipulated that the Monongahela River at the sites of discharge alleged in this case is a navigable water of the United States. Therefore you need not be concerned with whether or not it is navigable. It is agreed that it is, and that's it.

The controversy in part centers around the term "refuse." The definition of this term is a simple one. "Refuse matter of any kind or description whatsoever" encompasses all foreign substances and pollutants. It includes industrial waste of any kind and particularly solids. That is, particles in suspension as opposed to particles in solution. When a matter is in solution it is completely dissolved as the salt that was put in the water dissolved. If something is in suspension, the tiny particles are still there. They are not dissolved. They may even be too small to see, but they are still there. They are not dissolved into the solution.

The excepted refuse matter—in other words, the statutes, you will recall, except certain refuse matters. The excepted matter is that which flows from streets and sewers and passes therefrom in a liquid state. This means purely and simply, sewage.

Sewage is matter carried away in sewers. That is, water, filth and feculent material. Generally, sewage derives from human and domestic waste. It does not include industrial waste or discharge, especially those containing suspended solids. The mere fact that something flows in water does not make it in a liquid state. You cannot pour industrial waste into water and have it carried into a navigable stream and then contend that it is excepted because it is in a liquid state. What we are talking about is that refuse which I have just defined to you, water, filth and feculent matter which generally comes from human or domestic waste.

There has been a question of what a sewer is. A sewer really depends on the use for which a particular conduit is made. That is what determines whether it is a sewer or not, and not the construction of the conduit. For example, an iron pipe can be used to carry wires and that doesn't make it a sewer. You will recall that a conduit can be used for all kinds of purposes. It is the use which determines whether it is a sewer or merely a pipe. For example, you know, too, a pipe can be used to carry water to your home. That doesn't make it a sewer. A sewer means generally an underground conduit for fluid and feculent matter usually from houses and includes surface water, waste water and waste matter. The purpose of the sewer is to carry off such surface water, waste water and waste matter to another place for discharge.

One of the elements of this offense, as defined by this statute, is that it must have been committed unlawfully. I think the word is "not lawful." This simply means acts done knowingly and intentionally and with reckless disregard of the law. The Defendant must have known what it was doing and not have acted unintentionally in doing so. The Defendant need not, however, have acted with an evil or bad purpose, nor need there be any awareness that what was being done was in violation of the law. There is no contention in this case that this Defendant acted unintentionally or unknowingly. You will recall Mr. Johnston's testimony to the effect that the corporation knew of the discharge, but felt that they didn't need a permit. As I recall, he felt so because he said he did not consider that this was refuse. Whether he considered it refuse or not is not the important question. I have defined refuse to you as it has been defined by the law and you will have to accept that definition of refuse.

In that regard there are certain things which I have ruled in this case that you must not consider as relevant at all or consider at all in your determination. The Federal Government passed a law in 1899. How old it is doesn't make any difference. It is still on the books. It says that you cannot deposit in the navigable waters refuse matter, as I have defined refuse matter to you. Whether the deposit of such matters would of themselves have polluted anything or not has nothing to do with this case, nothing whatsoever, and I again say to you, if you pass on anything but the law as I give it to you, you are violating your duty. I agree that one drop of salt doesn't make the ocean salty, but if, on the other hand, the law forbids dropping salt in the ocean, you cannot drop it merely because you, in your own discretion, think that that wouldn't make it salty, so the effect on the ecology is not your concern.

Whether or not the Commonwealth of Pennsylvania had certain standards established, the reason for them establishing such standards, and whether or not this deposit would have violated them or not, is not of your concern. We are concerned here only with a Federal statute. You must determine only whether or not refuse, as defined by me, was deposited by this Defendant into some water which was carrying it into a navigable stream. I say to you again that the fact that forbidden matter is put into the water and carried into the stream does not make it in a liquid state. Furthermore, you were told that you must construe statutes strictly. It isn't your duty to construe statutes at all. It is my duty to construe statutes. All you do—not all you do. It is a very important task that you do. You determine the facts and then apply the construction of the statute as I give it to you.

There has always been a question as to bounty provisions. Congress, as a method of carrying out the enforcement of this Act, as they have done in other acts, provided a bounty or a reward for people who bring to their attention certain violations. The wisdom of that is not for you nor me to decide. Congress has said it is a policy of the United States to reward certain people under certain circumstances for bringing to their attention certain violations, and that is a method of enforcement. That is a method of obtaining the information necessary to carry out the law. You must not consider that at all in reaching your decision. Actually, you have no decision to reach as to whether they are going to get a bounty or not, get a percentage

of the fine, if such a fine is levied or not. That would be for me to decide under the appropriate circumstances.

Another thing I must charge you on is whether or not there were forms for permits, whether or not a permit was obtainable, has nothing whatsoever to do with this case. It is contrary to law to discharge these matters, as I have defined them to you, into a navigable stream without a permit, and if the Secretary of the Army in his discretion, decided not to give anybody a permit, so be it. It is not for us to decide that kind of an issue. The law says you must first get a permit, and if you don't get a permit you can't make such a deposit, and if nobody could get one for seventy years then nobody could lawfully deposit such matter into the river.

You are also certainly not to consider what the effect of enforcement of the law of the United States would be on industry or anybody else. If that has any bearing, it is not for you or me to decide. It is for the Congress or some person besides ourselves.

Also I instruct you that whatever instruction a person might get from an employee of the United States is not binding on the United States. The United States is not bound by what any employee tells them, so whether or not any person in the Corps of Engineers said a permit wasn't necessary, if he did say that, makes absolutely no difference. Ladies and gentlemen, if I should sit here and tell you that you can deposit a letter in the Post Office without an eight-cent stamp on it, I assure you that wouldn't cause that letter to go through the mails. The Government is not bound by what its employees say. It may be in certain kinds of circumstances, but not in anything with which we are concerned here.

Another thing that you are absolutely not to consider is whether there are other charges for similar acts against anybody else and what the results, the status of any such matters would be. These are matters which are of no concern in the search for truth in this case, which is all you and I are concerned with at this time.

I am not going to review all of the testimony in detail with you. I will briefly state the contentions of the parties. I caution you that if you think their contentions are something different than I think they are, accept yours and not mine because you and you alone are the finders of fact. The Government's contention, as I understand it, is simply that this Defendant

was discharging industrial waste or refuse into the Monongahela River. It contends that the Defendant knew what it was doing on the occasions here involved and it contends that the industrial waste included solid particles in suspension. The Government contends that this refuse was not sewage, as I have defined sewage to you, so that it does not fall under any exception.

The Defendant, on the other hand, contends that the matter which it was discharging was not refuse, within the meaning of the statute as I have defined it to you, and it contends this especially with regard to the concrete pipes because they served certain residential areas.

You will recall the testimony of the witnesses produced by both sides. Both sides produced experts. It is my recollection, but it is for you to determine, that some expert testified that this was industrial waste and couldn't be anything else. Some other witnesses testified that it could be something besides industrial waste. You must remember that.

In that regard the prosecution has the burden of proof, so if the net result of that deliberation is that it could have been both—it could have been from either, not both. If it was both, of course, you are not allowed to deposit anything, but if you reach the conclusion that it could have been from either one, either from the houses alone or from the plant alone, or both, then, of course, the Government would not have met its burden of proof. I am referring, of course, specifically to the content of this concrete pipe because, as you heard, water came in from the river and there was certain waste from certain houses, and you will recall what the Government witness said about it and you will recall what the defense experts said about it. The Government's contention that the Defendant is guilty of the offense charged and the Defendant's contention that it is not guilty depends and hinges upon the definition on an application of the term "refuse matter of any kind or description and other than flowing from streets and sewers and passing therefrom in a liquid state as sewage." You will recall that I have defined for you what I consider the key terms, "refuse" and "sewage." I do not consider sewers a key term because I consider the word "sewer" to depend on what is being carried. I defined these terms for you and you will be required to apply them in this case.

You will recall the testimony of the expert, Mr. Watts, the Government expert who testified, as I recall it—but again, take your recollection and not mine—he testified that in his opinion all four discharge samples were industrial waste. Mr. Lisanti, testifying for the Defendant, characterized both the discharges from the iron pipe, both the discharges from the iron pipe, [sic] as industrial discharges, and that from the concrete pipe sampled on August 19, 1970, as predominantly industrial discharge, but as to the discharge sample from the concrete pipe on August 7, which is Count One, his opinion is that it could as easily have been household waste as industrial discharge. You will remember what I charged is the burden of proof in that regard.

In connection with Mr. Lisanti's use of the term "industrial discharge," you will recall that in his opinion the samples could only be termed "industrial discharge" until he knew into what it was being put. In other words, he said that whether industrial discharge which is what came from the pipes was industrial waste depended into what the industrial discharge went and its effect thereon. Now, I have charged you that its effect on whatever it went into is not relevant to the case. We are concerned with what came out of that pipe and was deposited into a conduit which took it into the river, not on what its effect was after it got into the river, but this is principally a matter of semantics. Mr. Lisanti is using the term "industrial discharge" in a similar way to the way we are using the term "industrial waste," as I have defined it to you. I instruct you that the statute involved here is a broad one and does not contemplate the amount or the effect of the refuse matter discharged, although there isn't any evidence to that effect. I presume if somebody throws prohibited matter into a navigable stream, that's against the law even though the result of throwing it in there might be good. It provides that in order to discharge refuse matter of any kind or description whatsoever a permit is necessary before the deposit.

There has been some testimony in this case, as you know, regarding permits. The statute here provides that the discharge of refuse matter without a permit would be unlawful and it only becomes lawful if a permit to do so has been obtained prior to the discharge from the Army Corps of Engineers. If there were any evidence in this case that the Defendant had a permit that would conclude the matter. If they were discharging

refuse matter, as I have defined it to you, without such a permit, they would have violated the law, whether or not such a permit was available, and we don't know whether or not such a permit was available. We do know that there were none granted and that there were no forms for it and there were none applied for. There is no evidence in this case that the Defendant had a permit. As a matter of fact, the testimony indicates clearly that a permit had not been issued at all and the vice-president of the corporation testified that they had no such permit. I therefore instruct you that the defense of having a permit to discharge is not available to the Defendant in this case and you need not consider it. I further instruct you that the testimony to the effect that the Corps of Engineers may not have had application forms for a permit and may not have issued permits because no one applied for one prior to August, 1970, is irrelevant and not for your consideration.

The law presumes every Defendant to be innocent of crime. Thus a Defendant, although accused, begins a trial with a clean slate with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of the charge against the accused. The presumption of innocence alone is sufficient to acquit any defendant unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt as to each count individually and separately, after a careful and impartial consideration of all the evidence in the case. It is not required that guilt be proved beyond all possible doubt. You can't prove anything beyond all possible doubt. There are some people that doubt that two and two is four. The test is one of reasonable doubt. A reasonable doubt is a doubt based on reason and common sense, a kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs. A person—we are concerned in this case with a corporation, not a person, of course—can never be convicted on mere suspicion or conjecture. The burden is always on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant. The law does not impose upon the defendant in a criminal case the burden of calling witnesses or producing evidence or proving anything. A reasonable doubt exists whenever, after careful and impartial consideration of all

the evidence in the case, the jurors are not convinced to a moral certainty that a defendant is guilty of the charge. If the jury views the evidence in the case as permitting either of two conclusions, one of innocence, the other of guilt, then, of course, you must give the benefit to the defendant because of the presumption of innocence.

This case started on an information, which is a document prepared and signed by the United States Attorney. This is but a method of accusing a defendant of a crime. It is not evidence of any kind against the accused. There are various types of evidence from which a jury can properly find a defendant guilty. One is direct evidence and the other is circumstantial evidence. Direct evidence is evidence which directly demonstrates the fact. A witness's testimony that he knows of the existence of a fact from his own knowledge is direct evidence of that fact. Circumstantial evidence is evidence from which you may conclude a fact. Let me give you an example. In these days of Perry Mason and TV we have often heard, "This is only circumstantial evidence." Circumstantial evidence can sometimes be stronger than direct evidence. For example, if a man with very defective eye sight looks out into his back yard and sees an animal running around there and says, "There is a rabbit," that is direct evidence that a rabbit is in the yard. On the other hand, if an expert on tracks, on animal tracks, sees tracks and says, "Those are the tracks of a rabbit, therefore there has been a rabbit in the yard," that's circumstantial evidence, yet you could see that one could be stronger than the other. Circumstantial evidence is evidence from a certain fact from which you may infer certain other connected facts which usually and reasonably follow according to the common experience of mankind. Either direct evidence or circumstantial evidence, or a combination of both, may be sufficient to sustain a conviction, but only if from all such evidence together you are satisfied of such guilt beyond a reasonable doubt, as I have defined that to you. If you aren't, you must acquit.

The statements and arguments of counsel are not evidence in the case unless there was a stipulation or an admission. For example, there was a stipulation that the Monongahela River is navigable. That is now evidence. There have been two stipulations in this case, two stipulations of fact. You will remember one was that the Monongahela River is navigable, is a navigable water of the United States. The other one is that the concrete

and iron pipes and the manufacturing establishments are owned by the Defendant. The evidence in this case additionally consists of the sworn testimony of the witnesses, regardless of who may have called them, and all of the evidence received, all of the exhibits received in evidence, regardless of who may have produced them.

There was in this case various evidence to which an objection was sustained. Of course, you must therefore disregard totally any such evidence. There were also questions asked and there was no answer given. The question itself, as I have told you, is not evidence in any way and you shouldn't consider the question if an objection was sustained to it. Those matters which I instructed you must be disregarded must be disregarded by you totally. I mean by that, you must not make any use of them whatsoever. You are to consider only the evidence in the case. However, you are not in that way limited to the bald statement of witnesses. You are permitted to draw inferences from the testimony that was produced if you feel that they are reasonably justified in the light of your experience. You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, his motive, his state of mind and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified and whether he impresses you as having accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is supported or contradicted by other evidence in the case.

As to the persons who might receive a reward, of course, you can consider that in weighing the credibility of their evidence because they might have some interest. I merely say to you that the bounty system itself is a method used to enforce the law and from that you should draw no inference. You may use it in weighing the credibility of the testimony. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or not cause you to disregard such testimony. You should try to harmonize it, if you can. If not, you will have to decide just which one you believe.

Remember that two or more persons witnessing an incident or transaction may see or hear it differently or recollect it differently. This is a common experience. So is failure of recollection a common experience. That doesn't mean necessarily that the person who recollects differently is not telling you the truth. You must decide, however, what you do believe, what is credible.

In weighing the effect of a discrepancy always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy occurs from innocent error or intentional falsehood. After making your judgment you will give the testimony of each witness, if any, such weight as you think it deserves.

During this case you have heard the testimony of experts in chemistry and chemical analysis. In evaluating the testimony of an expert you should take into consideration his experience, qualifications, education and training, his ability to observe or know what he speaks of, his interest or bias or prejudice in the case in any way. In short, you determine his credibility. Some such witnesses have testified such as Mr. Watts and Mr. Lisanti. Their qualifications as experts were stipulated to and you may accept it, and as to Mr. Watts, the accuracy of the tests performed was stipulated to and his analyses, and you may accept that. There is no dispute as to what the tested samples contain but only as to the derivation of the contents and the properties thereof and the conclusions to be drawn from these characteristics of the various samples.

You will recall also the testimony of the other expert, Mr. Helwick. In that case you must first determine whether he is an expert because there is no stipulation as to that, so you must determine that first.

The opinions of an expert are not binding upon you. Although you are not to arbitrarily disregard the testimony of expert witnesses, if you find that their opinions are not based on all the relevant facts or are contrary to the evidence, you are free to disregard it. Again, you should try to harmonize the testimony of the experts, if you can. If you cannot, you must decide which, in your opinion, is the credible testimony.

As you know, this has been a hard fought case. Counsel sometimes react with emotion and then it becomes the problem of the Judge to keep everything going on an even track. Both men are officers of the court, both are honorable lawyers. They would

not purposely do anything wrong, and you should certainly not consider anything which may have occurred in my effort to keep the thing along the right track as indicating anything that you should hold against either of their clients. You should also not consider any opinion which I may have as to this case because that is totally irrelevant. The innocence or guilt is solely for you. I want to say that I would be permitted to comment directly upon the evidence offered if I saw fit to do so. I could say what I believe and what I don't believe. I didn't do that and I am not going to do that, so please don't try to read into anything which I may have said or any inflection of my voice or any facial expression or anything like that as being an indication of my opinion. I am neutral in the case. The case is for you to determine and if I weren't neutral and if I had an opinion it wouldn't make a bit of difference anyway because that's entirely for you, the jury, to determine. You are to determine the facts of this case entirely and alone upon the law, as I have given it to you.

I am going to send out various exhibits in the case which you should consider. When you go out to deliberate I think your attitude at the beginning is most important. It isn't helpful for a juror right off to express a view as to innocence or guilt. Then his pride becomes involved or her pride and it becomes difficult to change it. You should discuss the testimony, the evidence among yourselves. You are not partisans. You are judges, you are judges of the facts. Your sole interest is to determine the truth. You make a worthwhile contribution to the administration of justice when you arrive at a true verdict in a case.

I suggest that when you retire you elect a foreman and a secretary and proceed in a businesslike manner to determine the innocence or guilt of this Defendant. When you have completed your deliberation your secretary will then fill in the verdict slip which the clerk has prepared. You will then all sign the verdict slip. It contains room for the twelve signatures.

I think you know that you cannot return a verdict on any count unless it is agreed by all of you unanimously as to either innocence or guilt as to that count.

May I have the verdict slip.

You will find the verdict slip says, "And now, to wit," and there is a blank. You can fill in the date on which you reached the verdict. This is the 29th of June. You may or may not reach

your verdict today. "We the jury empaneled in the above-entitled case, find the Defendant as to Count One," and then we put in parentheses 230–1, concrete pipe, August 7, 1970, end parentheses. That's so you will know which one Count One is. Then there is a blank. You will fill in the blank. As to Count Two we have parentheses 230–2, concrete pipe, August 19, 1970, end parentheses. Then there is a blank. As to Count Three, parentheses 231–1, iron pipe, August 7, 1970, end parentheses, and a blank. As to Count Four, parentheses 231–2, iron pipe, August 19, 1970, parentheses, and a blank. You must fill in each one of the blanks with the words either "Guilty" or "Not guilty."

You may send any questions to us that you want as to matters of law through the bailiff and I will attempt to answer them for you, if I can. I will not be able to recall testimony because that is for your recollection and not for me, so please don't ask me, "What did Mr. Jones say," or anything like that.

There are twelve lines here. Each of you has to sign the verdict. You put it in the envelope, seal it and give it to the bailiff. If you have some other kind of a question, you put it in an envelope, seal it and give it to your foreman. He will then give it to the bailiff and the bailiff will see that it gets to me.

[Side bar conference.]

Mr. GONDELMAN. I object to the characterizations that are shown on that verdict slip as being totally unfair because you are indicating to the jury that in Count One they are to consider 230–1, which has many many items on it which have nothing to do with this case.

The COURT. I will take all designations off and prepare a new verdict slip with just "Count One, Two, Three and Four."

Ladies and gentlemen, counsel has objected to the designation of the counts. I am going to prepare a new verdict slip and it is going to say, Count One, guilty or not guilty, No. 2, guilty or not guilty, No. 3, guilty or not guilty, and No. 4, guilty or not guilty, and you will have to recollect what each individual count meant. As I have told you, Counts One and Two refer to the concrete pipe. I will send out the indictment and you can read from the indictment what the various counts refer to.

Mr. GONDELMAN. You are sending out the information.

The COURT. The information, rather.

Mr. GONDLEMAN. And the amended information?

The COURT. Yes, I will send out the information and the amended information.

Mr. GONDELMAN. Very well. No objection.

The COURT. Of the twelve original jurors, is anybody not feeling well or feel they cannot take part in the deliberations for any reason?

All right. Then Mr. Telluci, the alternate, is excused with the thanks of the Court. I don't want you to think that what you did was in vain because if somebody would have been ill or unable to be present or deliberate we would have needed you and we wouldn't want to try this all over again, so thank you very much and you may return to Room 536.

Will the bailiffs come forward to be sworn, please.

[The jury retired to deliberate.]

The COURT. Mr. Thornburgh, do you have any objections to the charge?

Mr. THORNBURGH. No, Your Honor.

The COURT. I gather neither party had any additional charge you wanted me to make because you didn't make them while the jury was still in the room.

Mr. GONDELMAN. I have exceptions.

The COURT. Exceptions, yes, but no additional charge to the jury because that's why we came to side bar and nobody asked for any additional charges. You may make your exceptions.

Mr. GONDELMAN. I take specific exception to Your Honor's telling the jury at the opening that the arguments of counsel are not to be considered by them and at no point did you tell them that they are to consider arguments of counsel. You said arguments of counsel are not evidence. So far as this jury knows, they are to pay attention to neither argument of counsel.

The COURT. That would have been a proper matter, and if you had asked I would have charged them on that.

Ask the bailiff to bring back the jury. Tell the bailiff I want the jury to put back in the box.

You should have requested that before I let the jury out. Do you have any more matters that you want them charged on?

Mr. GONDELMAN. Yes, sir.

The COURT: Why didn't you do that?

Mr. GONDELMAN. I didn't have a chance to.

The COURT. You were at side bar.

Go ahead.

Mr. GONDELMAN. You also told the jury they were not to be swayed by public opinion or possible sentence. You did not tell

them they are not to be swayed by the effect of their finding the defendant not guilty.

I except to Your Honor's submitting Counts One, Two, Three and Four to the jury as they are written. The only evidence in this case is that iron, aluminum and various specific items that are mentioned in this information are not regarded as of any consequence by Mr. Watts, the Government's own witness. He specifically said that as to iron, aluminum and other matters that were in each of the exhibits.

I except to the fact that you failed to charge on the matters contained in Section 419 of the Refuse Act which requires the Secretary of the Army to post regulations.

The COURT. Was there any point for charge submitted to that extent?

Mr. GONDELMAN. I submitted no points for any charge because Your Honor had indicated that none of the matters which I am now raising have anything to do with this case, and I didn't feel it was necessary. You failed to charge on the duties of the Secretary of the Army as they presently exist and the fact that under present regulations it is the duty of the Secretary of the Army to circularize the fact that permits are necessary and to get applications out.

I except to the definition of "refuse." Your Honor said it was a simple definition, that it is all foreign substances and pollutants, including industrial waste, particularly solids. I especially except to that in light of the fact that you used the word "pollutants" and yet at no time in this trial has the Defendant been able to prove that the matters which the Government objects to are not pollutants under any standards of the State or Federal Government. In fact, they comply with the standards.

I except to Your Honor's definition of "sewage." Your Honor said sewage is what flows from streets and sewers in a liquid state, which included water, filth and feculent matter, and does not apply to industrial waste. The Act does not use the word "sewage," but says matters flowing from streets and sewers.

I except to Your Honor's charge where you said one of the elements of the offense is that it must be an act unlawfully done. Your Honor stated this means the act was done knowingly and intentionally and with reckless disregard of the law. Then Your Honor said, "But it is not the contention of the Defendant that the act was done unknowingly or unintentionally." In fact, this Defendant does contend that the act was unintentional and unknowing in view of the fact that what was done complies

with the State and Federal standards and therefore it is not unlawful.

I except to the fact that Your Honor has even submitted the question of whether or not the fluids flowing, in all of the matters before the jury, are in a liquid state, when every expert testified that it was in a liquid state.

The COURT. I don't think they did. I think that was an incorrect statement that you argued to the jury, but go ahead.

Mr. GONDELMAN. We can disagree on what the evidence is, but my recollection of Mr. Watts' testimony is that I asked him specifically whether or not each sample was in a liquid state, and he said yes.

I except to the submission to the jury of the statement of Your Honor that whether or not there were forms for permits or whether they were obtainable is not to be considered. You then stated—and there is absolutely no evidence in this record—that if the Secretary of the Army, in his discretion, decided not to give permits, that is not for their consideration. Of course, the Secretary of the Army didn't decide in his discretion. We haven't been able to go into the fact that they simply didn't have them.

The COURT. You have said that several times. I don't think that is an accurate statement.

Mr. GONDELMAN. I would have been glad to prove it. Your Honor wouldn't let me.

The COURT. All you proved is that there were no forms. If somebody wanted a permit they could have written to the Secretary of the Army and said, "I would like to dump effluent into the river." That would be an application.

Mr. GONDELMAN. The fact that Your Honor said to the jury that if the Secretary of the Army in his discretion—I don't know where that evidence could come from or where the comment could be made to the jury. Your Honor has to comment only on evidence, too.

The COURT. That isn't true either.

Mr. GONDELMAN. You stated whatever instructions a person gets from an employee of the United States doesn't make any difference. It does make a difference insofar as it reflected the attitude of the Corps of Engineers. The example of the Post Office and mailing a letter, if you were told you didn't need an eight-cent stamp, of course, it would go and the receiver would

eventually pay the postage. That has no application in this case.

The COURT. Try it, Mr. Gondelman. It won't work that way.

Mr. GONDELMAN. Well, it does.

I specifically again except to the repeat in Your Honor's charge when you again said that the Act says that "sewage" is excepted instead of "matters flowing from streets and sewers."

Your Honor indicated that Mr. Lisanti testified for the Defendant—in fact, at the time referred to by Your Honor he testified for the Government and the Government was bound by his testimony. Mr. Lisanti's testimony was that industrial discharge depended on what it went into and its effect. I except to the fact that Your Honor then stated that Mr. Lisanti's characterizations were only a matter of semantics and that, in effect, his definition is the same as the Court's, which it isn't.

You stated it was irrelevant if the Corps did not have permits later again in your charge, to which, of course, we except throughout the charge to that, and especially to the statement that the Defendant would have violated the law even if permits were not available.

I think basically those are the items which I except to in Your Honor's charge as given to this jury.

The COURT. Will you bring back the jury.

[The jury was returned to the courtroom.]

The COURT. Counsel have raised some additional matters. You will recall that I charged you that the arguments of counsel are not evidence. Counsel states that I failed to charge you that they are entitled to your respective consideration. I did so charge you in the preliminary instructions that were given you and I tell you that again. They aren't evidence. Insofar as they were proper arguments, you are entitled to consider them. Insofar as they are arguments contrary to my instructions, you must not consider them.

As to the witness, Mr. Lisanti, it has been brought to my attention that I said he testified as an expert for the Defendant. You will recall that he testified as an expert for both parties. He testified partly as an expert for the Government and partly as an expert for the Defendant, and you will consider the testimony which he gave in both capacities in reaching your verdict.

Is there any additional matter that anybody wants me to charge the jury?

Mr. GONDELMAN. No, sir.

The COURT. All right. You may retire for your deliberation.

[The jury again retired to deliberate.]

[Jury returned to the courtroom.]

The COURT. Ladies and gentlemen of the jury, your foreman has sent this note. "Please define again refuse matter."

I am going to repeat the charge that I made previously as to refuse matter. This may not be word for word, but it will be as close as I can make it. Refuse matter of any kind or description whatever encompasses all foreign substances and pollutants. It includes industrial waste of any kind and particularly solids. That is particles in suspension as opposed to in solution. When I say "all foreign substances and pollutants," it wouldn't have to be both because there may be no evidence of one or the other, but foreign substances and pollutants, or either one of them.

As to excepted refuse matter, when I say "excepted," I mean the exception from the statute, what the statute makes an exception for, and that is that which flows from streets and sewers and passes therefrom in a liquid state. This is the excepted refuse matter. In other words, that could be refuse matter, but it is excepted. This simply means sewage. The exception is sewage. Sewage is matter carried away in sewers. That is water, filth and feculent matter. Generally sewage derives from human and domestic wastes. That is an exception. Sewage can, in fluid state, be put into the waters. The exception does not include industrial wastes or discharge, especially those containing suspended solids.

I have previously also defined "sewer" for you. A sewer, as I said to you, is defined by the particular matter for which it acts as a conduit and not the construction of the conduit itself. A concrete pipe or an iron pipe could be a sewer. It could also carry electric wires or any other number of things. It is a sewer if it carries sewage, and sewage is as I have just defined it to you, and that is an exception from the prohibition. Sewage is an exception which flows from the streets or sewers. Refuse matter, as I have defined it, which is not sewage, is not an exception.

The COURT. Is there any objection or anything you want to talk to me about as to the way I just defined "refuse matter?"

Mr. GONDELMAN. I do, Your Honor, but I don't know that this is the time and place for it.

The COURT. Is there any additional matter you wish me to charge on that definition?

All right. Then you may renew your deliberation.

Do you want to write something else?

The FOREMAN. Yes.

The COURT. Give the foreman this note. Write it, sir, and then I will ask counsel to confer on it.

[Foreman complying.]

The COURT. I am not sure I understand that. "You use the term 'refuge' in your definition. The word I am referring to is 'refuse, r-e-f-u-s-e'."

That's the word that I am defining and that is the word used in the statute, "refuse, r-e-f-u-s-e," and in another sense you could call it "refuse", but that is what we are not talking about here. We are talking about "refuse" as I have defined it to you and as I have spelled it for you.

Will you retire the jury for further deliberations.

[The jury again retired to deliberate.]

The COURT. I will show you that note and we will preserve it. Apparently my pronunciation of the word——

Mr. GONDELMAN. I am sure what he is referring to is that when you said "refuse" it sounded like "refuge." It came across as "r-e-f-u-g-e" instead of "s-e."

I, of course, want to once more except to the definition of "refuse matter of any kind or description," as Your Honor has defined it, especially again in light of the fact that you call it "any foreign substance and pollutant," for the reason that in light of the trial of this case the defense has not been able to show what a pollutant is or is not.

I further except to the definition of the word "sewer" as being synonymous with "sewage." I have Webster's New Collegiate Dictionary which says, as I quoted to the jury, cited to the jury, "A sewer is an artificial, usually subterranean conduit to carry off water and certain waste matter." It defines "sewage" as "The content of a sewer or drain, refuse liquids or matter carried off by sewers." Your Honor has totally taken away from the jury the fact that refuse which flows in a sewer is excepted from the Act and that the burden, of course, is on the prosecution to prove otherwise. I know of no definition as given by Your Honor to this jury and I think it is extremely prejudicial.

The COURT. I don't think I did that. I tried to point out that a sewer is a conduit which carries sewage.

Mr. GONDELMAN. Then you defined sewage as only referring to household waste, feculent matter, and sewage as it is defined by every standard that I have been able to uncover encompasses, "including industrial waste."

The COURT. I don't think so. What you are arguing is that if industrial waste goes through a sewer, then it is excepted, and I don't think that is a correct statement of the law.

Mr. GONDELMAN. In a liquid state.

The COURT. I don't think that is a correct statement. If that is a correct statement, then there are various ways that you can——

Mr. GONDELMAN. I respect your contentions, but I don't think a correct statement is that a sewer carries only human waste, which is what Your Honor has said to this jury, which takes away the industrial waste problem.

The COURT. Anything could go down a sewer. If you throw a gumball down a sewer, that is not sewage.

Mr. GONDELMAN. I am not saying that is sewage. Under the statute anything that flows from sewers and streets and passes therefrom in a liquid state, without saying "except that it must be limited to human excrement and ——"

The COURT. You may be right. I merely took that from a Supreme Court decision. If they are wrong, I am wrong.

Mr. GONDELMAN. The Supreme Court sometimes defines matters in very broad and general terms without being applicable to a particular fact situation, which is what I am trying to do here.

The COURT. Sometimes they change their minds, but I have to follow what they have said already until such time as they do change their minds.

Mr. GONDELMAN. I don't think I have anything further. I think I have excepted to the definitions, as I have previously.

[The jury returned to the courtroom.]

The CLERK. Members of the jury empaneled in the case of United States of America, Plaintiff, versus Pennsylvania Industrial Chemical Corporation, Defendant, in Criminal Action No. 71-75, you say you find the Defendant, as to Count One, guilty; Count Two, guilty, Count three, guilty; as to Count Four, guilty. So say you all.

Mr. GONDELMAN. May I have the jury polled, Your Honor.

[The jury was polled.]

The COURT. Ladies and gentlemen of the jury, I want to extend to you the thanks of the Court for your devotion to duty in this case. Although it isn't as dramatic as some of the criminal cases we read about, I think this is a highly significant case on a matter which is of grave importance to our country in the future. As I said to you during the course of the deliberations, I had to make various rulings. Some of these rulings chart new ground, as far as I know. If my rulings were not correct, there will be adequate ways for us to determine what the law is as determined by the right body. However, you have rendered your services in a commendable fashion. The Court thanks you. You are now excused from any further jury duty.

[Whereupon the hearing was concluded.]

CERTIFICATE

I hereby certify that the evidence and proceedings are contained fully and accurately in the stenographic notes taken by me on the trial of the above cause (pages 140 through 403), and that this is a correct transcript of the same.

VERONICA MECHESNEY,
Court Reporter.

PROCEEDINGS OF SENTENCE OF JULY 30, 1971

In The United States District Court for the Western District of Pennsylvania

Criminal Action No. 71–75

UNITED STATES OF AMERICA

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, A CORPORATION, DEFENDANT

Proceedings

Sentence in the above entitled action, on July 30, 1971, at 10:00 A.M., Pittsburgh, Pennsylvania, before Honorable Hubert I. Teitelbaum.

APPEARANCES

On behalf of the Government: Richard Thornburgh, United States Attorney.

On behalf of the Defendant: Harold Gondelman, Esquire.

The COURT. Good morning.

Mr. THORNBURGH. Good morning, Your Honor.

THE COURT. The first thing we will take is the United States of America versus the Pennsylvania Industrial Chemical Corporation.

Mr. Thornburgh.

Mr. THORNBURGH. This case at Criminal 71–75 comes on for sentencing this morning before Your Honor. I note the presence of counsel for the corporation, defendant, Mr. Gondelman.

Mr. GONDELMAN. Good morning, Judge.

Mr. THORNBURGH. As Your Honor recalls, on June 29, 71, the defendant, Pennsylvania Industrial Chemical Corporation, was found guilty by a Jury before Your Honor on four counts of violating Title 33, Section 407, of the Rivers and Harbors Act of 1899.

While, Your Honor, we recognize that the sentencing is the sole prerogative of the Court, and we will make, as is the ordinary custom of the United States Attorney's Office, no recommendation with respect to the sentence, I would be remiss if I did not bring to the Court's attention, on the record, the provisions of Section 411 of Title 33, the gist of which is that the Court in its discretion has the power to award one-half of any fine that is imposed for violations of Section 407, in the words of the statute, to the person or persons giving information which shall lead to conviction.

For the benefit of the Court, and to again make the record absolutely clear, the United States Attorney's Office must point out that this proceeding against the Pennsylvania Industrial Chemical Corporation could not have proceeded without the information furnished by individuals that I will indicate with respect to each of the counts upon which they were convicted; and Your Honor, of course, having heard the case, this will merely refresh your recollection by stating on the record the circumstances.

As to Count One, the data was gathered by Mr. David G. Nixon and John Zavodni, in their travels in the Monongahela River in a canoe, as Your Honor will recall from the testimony; and the information, the samples that they gathered were analyzed, and the report rendered to them and to the United States Attorney's Office by Michael Watts, acting on behalf of the Soil and Water Conservation District of Allegheny County.

The same holds true as to Count Three. That is, Mr. Nixon, Dr. Zavodni and Michael Watts each had a part, as the record indicates, in furnishing the information which lay the basis for the prosecution and for the guilty verdict.

As to Counts Two and Four, the information was provided by David G. Nixon, Thomas Young. As Your Honor will recall, Dr. Zavodni was on vacation on August 19, the date of those two counts; and similarly, Michael Watts, of the Soil and Water Conservation District, performed the analysis and rendered the report to Messrs. Nixon, Zavodni and Young, and subsequently, the United States Attorney's Office, which formed the basis for these proceedings.

I mentioned these, Your Honor, not by way of anything other than what we feel bound to bring to the Court's attention, under the provisions of Section 411, the Court having discretion to award one-half of any fine in the proceeding to the person or

persons giving information which shall lead to conviction, the United States Attorney's Office feeling that Messrs. Nixon, Zavodni and Young, and Watts, in the manner indicated, are indeed person or persons who gave information which led to the conviction in this case.

The COURT. The Pennsylvania Industrial Chemical Corporation appears by its counsel.

Mr. GONDELMAN. That is correct, Your Honor.

The COURT. That is permitted, of course, by the rules. There is nobody else appearing for them.

Mr. GONDELMAN. That is correct, sir.

The COURT. Is there anything you would like to say?

Mr. GONDELMAN. I would like, at this time, like to get into the record all of the matters that Your Honor would not permit the Jury to hear, because I think it is in mitigation of any penalty which Your Honor might impose.

The COURT. We will hear it in mitigation of any penalty.

Mr. GONDELMAN. In connection with the four counts of this indictment, I think it is remiss of the United States Attorney and the informants not to have investigated and found that, as to each element and chemical charged in each count of the information, the amounts of discharge into the Monongahela River is less than the standard set up by the Commonwealth of Pennsylvania and for which the Pennsylvania Industrial Corporation had a state permit. Those standards are accepted and adopted by the United States Government, so that the conviction of discharging those chemicals into the Monongahela River is a conviction for discharging what the Government of the United States says, by its own agencies, is not a pollutant and is well within the standards of Water Quality Control.

Now, in Your Honor's opinion, you talked about a permit, and I guess the answer is, we are supposed to be found guilty actually of discharging without a permit, because the permit, if there had been a procedure to secure one, would have been issued.

I can only cite to Your Honor, EPA Administrator Ruckelshouse, who I think is supposed to be somewhat of an authority and is in charge of this whole matter in the United States of America, Mr. Ruckelshouse, in answer to this question, made—answered this question this way; Isn't there overlapping federal jurisdiction on enforcement already, under the Refuse Act

and the Federal Water Pollution Control Act? He said the laws almost contradict one another.

Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable water or their tributaries without a permit.

The COURT. As I understand, what you are saying, Mr. Gondelman, not only is Mr. Thornburgh remiss, but the Congress, for passing contradictory legislation.

Mr. GONDELMAN. That may be. They both may be remiss.

The COURT. I am afraid you will have to direct that to the Congress, and the other to, Mr. Thornburgh. I will hear anything you want in mitigation.

Mr. GONDELMAN. I think this is in mitigation, because certainly, if you have one defendant before Your Honor whose effluent exceeds and violates the Water Quality Control standards.

The COURT. That is in mitigation, now.

Mr. GONDELMAN. Right, but if you are talking as you did in your opinion, that we did not have a permit, let me just call your attention to what Mr. Ruckelshaus says about it. He said the Water, Federal Water Pollution Control Act specifies the setting of standards by the states, and approval by the Federal Government, which was done in this case.

Under the 1965 Act, the people are to comply with the Water Quality Standards. It says nothing about discharge into a stream being illegal.

It really isn't entirely fair to say the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream.

EPA has restricted its use of the 1899 Act to cases where somebody was not in compliance with Water Quality Standards, and was not doing anything to achieve compliance with those standards. There are enough of those cases to keep us busy for some time.

The COURT. You understand, now, your client was not found guilty of not having a permit, and I did not say that in my opinion. What your client was found guilty of was discharging refuse into the water. That is what he did, and that is what I

said in my opinion; and he did not have the permit that might have permitted him to do it. The offense was not having a permit. The offense was dumping refuse.

Mr. GONDELMAN. And without a permit. Because, if he had a permit, he wouldn't be guilty of a crime.

The COURT. No, that would have given him permission to do it. But he did it. He was forbidden to do it, and you say that there was no procedure to get a permit. I think there was. I think he could have written to the appropriate Secretary and told him what he wanted to do, and said, "There is a provision of law for a permit," and then the Secretary could have said, "Yes, I will give you one." He could have written him a letter and given him one, or he could have said, "No, I won't."

Mr. GONDELMAN. All I'm doing is calling Your Honor's attention to it, although I understand that's the Court's opinion and viewpoint. I'm saying Mr. Ruckelshaus deals only with Environmental Protection Agency, has in an interview informed us, and I'm trying by that to inform the Court, that the fact is that, despite the thought of Your Honor and the viewpoint of Your Honor, that if somebody had written to the Corps of Engineers and asked for a permit, they might have gotten a permit.

The COURT. I do not know they would have or not. The fact is, they dumped without a permit.

Mr. GONDELMAN. The fact is, under Mr. Ruckleshouse's statement, there was absolutely no procedure, nor did the Corps of Engineers issue; and under the exhibits I have shown to Your Honor, that are now sealed, which I would want to have opened so I can get copies for the Court of Appeals when this case goes up, that the permit——

The COURT. It is already up.

Mr. GONDELMAN. No, sir. We take it from today; couldn't appeal before sentence.

The COURT. That is right. You are quite right.

Mr. GONDELMAN. The fact is that the exhibits, which are sealed in the envelope, show that the Corps of Engineers has fourteen to eighteen-page application for permit, dated April and May 1971.

The COURT. You understand, the way I see this, a person who drives an automobile must have a license. If he does not have a license, the offense is not having a license; the offense is driving the automobile. He may drive if he is granted that

privilege by a license. If he is not granted that privilege he cannot drive; and it would not make any difference if the State of Pennsylvania all of a sudden decided not to issue any licenses, as I see it.

Mr. GONDELMAN. Of course, then, you would get into very complicated constitutional problems.

The COURT. We may, but I am using it merely as an analogy.

Mr. GONDELMAN. I use that analogy in connection with this case, because——

The COURT. It may be unconstitutional to prohibit you from dumping your industrial waste into the river. That is not for me to say. I do not think it is unconstitutional.

Mr. GONDELMAN. It is for Your Honor to say.

The COURT. I do not think it is not unconstitutional. You have not raised it, so it is not for me to say.

Mr. GONDELMAN. The fact I haven't is, I haven't raised it, because there is a way of harmonizing the Acts Your Honor hasn't accepted, and that is to use the Act of 1970 to impair 1899.

The COURT. I have nothing before me except a sentence.

Mr. GONDELMAN. So, I'm trying to get simply to the fact that, in mitigation, you have a Corps of Engineers, and an Act of 1899 which, until December 23, 1970, did not have a permit program of any kind.

The COURT. You are arguing the case.

Mr. GONDELMAN. When you say we discharge without a permit, I think, in mitigation of that, I must ask Your Honor to consider the application of that Act and its enforcement, and the manner in which the Government, who is, after all, the party plaintiff in this case—it is the United States of America versus—the United States of America, since 1899, has not had a permit program.

The Federal Register, which I gave Your Honor, indicates that on December 23, 1970, President Nixon directed the Corps of Engineers to establish that program, so that it is a twofold argument in mitigation. Item number one, there was no permit program in America. Item number two, insofar as what we are charged with polluting the rivers with, under the Commonwealth of Pennsylvania, and the United States Government's definition of pollution in the waters, which are supposed to be the reason for this case being brought, as part of the ecology program of the country, and the United States At-

torney's Office, local. The fact is that what was done did not affect the ecology, from those who are setting up the ecology standards.

Item number three, in June of 1970, before those who Mr. Thornburgh indicated should partake of any fine that Your Honor might impose, in June of 1970, Chester Engineers was hired, as Your Honor heard, and were in the process of developing a new water treatment plant, not because what the company was doing violated the standards then in force, but because the new Pennsylvania standards which are to come into being in December, 1972, would require us to go further than we have gone to this date. Therefore, Chester Engineers was in the process, before the Government of the United States came around to see this defendant, before anybody rode up and down their property with a canoe, with getting an expert in water quality control to design, and they have designed, a water treatment facility, which will further clean the waters coming from the PICO plant.

The COURT. You say somebody rode up and down somebody else's property in a canoe.

Mr. GONDELMAN. I'm saying, in front of the property.

The COURT. You do not contend you own the Monongahela River.

Mr. GONDELMAN. I'm not talking about trespass. I am referring to the fact there was a canoe on the Monongahela River, and before that canoe was on the Monogahela River, Chester Engineers was there conducting samples and making a study that would do more for the ecology than this case is doing for the ecology, because it is an affirmative action by a company who is aware of its responsibilities in this environmental process, and who are designing and are in the process of getting state and federal permits for a treatment facility which will cost in excess of $300,000 to install and in excess of $50,000 a year to operate.

So, I think what I'm trying to say, Your Honor, is that this defendant is not one who has flagrantly violated the ecology laws, or the Act of 1899, or any other laws of this country; but has in fact attempted to work within those laws, as everybody understood those laws, up until the Act of 1899 was used as it has been in this case. But the—before the Government got into the act, and before Nixon or Zavodni got into the act, this company was in the process of doing the intelligent thing, and that

is hiring the experts in water quality standard control to develop that water treatment facility.

So, I think that the company has shown that it is not a flagrant violator. It is not simply dumping water, under the theory it owns the Monongahela River, which it does not.

The COURT. No, I thought you said that; I was not sure.

Mr. GONDELMAN. I didn't say that. But they do recognize their responsibility in this community. They have been there for fifteen years. They have attempted——

The COURT. How long have they been there? Fifteen years?

Mr. GONDELMAN. Yes.

The COURT. When did they hire Chester?

Mr. GONDELMAN. When did they first hire Chester?

The COURT. Yes.

Mr. GONDELMAN. Well, they didn't hire Chester.

The COURT. To do whatever Chester is doing there.

Mr. GONDELMAN. When they built the plant, I have to give you this background. The background of it is, when the plant was built, it wasn't Chester. There was another expert in water quality control who did build a water treatment facility, which has been operating at a cost of ten or fifteen thousand dollars a year, to bring the discharge of the plant into the Monongahela River within the then Pennsylvania Water Quality Standards. That has been going on since that plant was built.

Chester was engaged in June of 1970, when the Commonwealth of Pennsylvania had passed a higher standard, which requires a new water treatment facility.

The COURT. Now, I understand. Thank you.

Mr. GONDELMAN. They didn't just open a plant and dump their refuse into the Monongahela River, at any time.

The COURT. You know what the maximum fine here is.

Mr. GONDELMAN. Yes.

The COURT. Is there anything you have to indicate that the Pennsylvania Industrial Chemical Corporation is in bad condition?

Mr. GONDELMAN. I don't think that has a thing to do with it.

The COURT. It would. If they did not have the money, I would be inclined to take that into consideration.

Mr. GONDELMAN. I would want Your Honor to take into consideration, this defendant is not a flagrant pollutor; and from that standpoint, that they are deserving of the consideration

of the Court, because they had every permit except the Corps of Engineers permit.

The COURT. Thank you, sir. Mr. Thornburgh, did you——

You did not want to say anything more, did you?

Mr. GONDELMAN. No. I wouldn't think of burdening Your Honor.

Mr. THORNBURGH. Although neither Mr. Gondelman or myself are sworn witnesses, there are certain factual matters that Mr. Gondelman referred to which I would like to have corrected.

It is the Government's position, although we were never put to the test on it, that there was indeed a program in the Western District of Pennsylvania for the obtaining of permits. None were ever sought. But the regulations of the Corps of Engineers make it manifest that such permit applications were contemplated, and there was a written procedure having to do with it. I don't mean to retry that issue here, but I think it is only proper to put the Government's position on the record.

Secondly, with respect to Mr. Ruckelshaus, who is a personal friend of mine, and a man for whom I have a great deal of respect, I nonetheless suggest to the Court and to Mr. Gondelman that the areas and spheres of responsibility of Mr. Ruckelshaus, as the head of the Environmental Protection Agency, and Richard Thornburgh, the United States Attorney for the Western District of Pennsylvania, a much smaller job, are entirely different. Our job is to enforce the criminal laws of the United States, one of which is the so-called Refuse Act of 1899; and while we would take into account any views Mr. Ruckelshaus had with respect to what the Department of Justice and the United States Attorney should do, it is our job, in the final analysis, to enforce these laws.

Finally, Mr. Gondelman having submitted material in mitigation, I can't help but present to the Court, if the Court will receive it, some evidence or material in exacerbation, if you will; a report of Mr. Watts, of the Bureau of Tests, with respect to samples taken at the discharges in question, on June 22, 1971, a little bit more than a month ago, showing similar or more serious quantitative discharges out of the pipes in question, and I would ask the Court's leave to submit that to Your Honor.

The COURT. That is since the indictment?

Mr. GONDELMAN. Information.

Mr. THORNBURGH. This is just a month ago.

The COURT. Indicating they continue to do that.

Mr. THORNBURGH. It is at least consistent; and in one case, although I'm not a water quality expert, in one case it would appear to me to be more serious than the matters. I'm sorry I don't have a copy.

Mr. GONDELMAN. I don't need a copy. I can tell, Your Honor is the fact still is that everything that is in that exhibit, and it was in the exhibit before the Court, when taken as the experts take it in the flow of the Monongahela River, is well below the United States Government's Water Quality Control Standards.

The COURT. You are continuing to violate the law, if I am correct on what the law is.

Mr. GONDELMAN. No. Now, you see that isn't true. If I may suggest again to Your Honor the fact——

The COURT. I said if I am correct on what the law is, there. Do they have a permit now?

Mr. GONDELMAN. Let's study the law. See, if I could only get a chance to tell Your Honor that, I will. May I?

The COURT. Go ahead.

Mr. GONDELMAN. May I tell you?

The COURT. May I have one second?

Go ahead, Mr. Gondelman.

Mr. GONDELMAN. The fact is, as I suggested to Your Honor, we had until July 1, 1971 to ask for a permit, under the Act of 1899, as implemented in the Federal Register. The fact is, this company, because it had hired Chester Engineers, had its program so far advanced that it could have had its plans accepted by the Corps. They have already been certified by the State of Pennsylvania. They have been accepted by the Corps of Engineers. It would now appear that PICO will have number one permit in the Western District of Pennsylvania, now that there is a permit program.

So that the fact that they are still operating their business, and on June 22 had discharges into the river, it is still under the application. We certainly were, intended to and did file the permit application, as soon as the Government of the United States made them available. It isn't as simple as writing a letter. You wouldn't look at the application permits, but take a look at what the Government requires before you say that all you have to do is write the Corps of Engineers a letter and say, "Please give me a permit." There are fifteen pages of ap-

plications, with analysis and everything that has to go into getting a permit.

That permit has been applied for, and I understand it will be issued, because it is in compliance and has been certified by the state, which is all the Corps of Engineers is looking for.

The COURT. Anything further?

Mr. GONDELMAN. No, sir.

The COURT. It is the sentence of the Court, at Criminal Number 71-075, that on Counts One, Two, Three and Four, the defendant, Pennsylvania Industrial Chemical Corporation, is fined $2,500.00 each, for a total of $10,000.00.

I am going to award half of the $10,000.00 to David George Nixon, John J. Zavodni and Michael Watts, in even shares. I have not included Mr. Young, because I feel that he was really only substituting for one of the men on one of the occasions, if these gentlemen are inclined to take that into consideration themselves.

Mr. GONDELMAN. I assume there is no problem, since I have no notice of appeal ready, anticipating Your Honor's sentence and decision.

Mr. THORNBURGH. I don't know whether Your Honor has to, for the record, notify them of their rights to appeal——

The COURT. He will appeal, so he will not be heard.

Mr. GONDELMAN. I just anticipated, by having my notice. I didn't think it was nominal.

The COURT. You would have appealed if it were nominal, anyway. The fine does not make any difference. It is the principle.

Mr. GONDELMAN. It is the principle and some other things, now.

(Whereupon, the following discussion took place when no counsel were present.)

Mr. NIXON. Excuse me, Your Honor. May I be heard?

My name is David Nixon. I was one of the informants in the case of Pennsylvania Industrial.

Your Honor, I'm no attorney, but I would respectfully ask you to reconsider a portion of your decision as to who should be awarded the fine. If I may respectfully call Your Honor's attention to the United States versus Simmons.

The COURT. What is it you want me to do?

Mr. NIXON. I maintain, sir, that the information that was provided to the United States Attorney on October 22, 1970, was identified, that information identified the informants as in an affidavit, of which I have a copy——

The COURT. What is it you want?

Mr. NIXON. As David G. Nixon and John Zavodni.

The COURT. What do you want me to do?

Mr. NIXON. I request Your Honor to grant the portion of the fine to which the informants are entitled to those parties and——

The COURT. I thought I did.

Mr. NIXON. Your Honor included a third party, sir.

The COURT. Yes, Mr. Watts.

Mr. NIXON. Yes, sir. And, in so doing, I respectfully call your attention to the United States versus Simmons, if I may.

The COURT. I will not do what you have requested. I am going to give Mr. Watts a share, too. He did a substantial amount of work in this matter.

I do not want to hear anything more about it. Mr. Gondelman is no longer here. Another case has been called.

Mr. NIXON. Thank you, sir.

CERTIFICATE

I, Jordan Lilienthal, Official Reporter, do hereby certify that the foregoing transcript is true and correct.

JORDAN LILIENTHAL,
Official Reporter.

PITTSBURGH, PENNSYLVANIA.
AUGUST 31, 1971.

[Government trial Exhibit No. 7 (Admitted at —)]

Code 230–1

pH	8.8
Alkalinity, total as $CaCO_3$ ppm	1070.0
Alkalinity, (bicarb HCO_3) as $CaCO_3$	—
Alkalinity, (carb CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to acid and Fe-Al salts	—
Hardness, total as $CaCO_3$ (EDTA)	52.0
Iron, total Fe	0.4
Aluminum, Al	40.4
Manganese, Mn	0.1
Chloride, Cl	20.0
Phosphate, total PO_4	0.0
Sulphate, SO_4	262.0
Cyanide, Cn	0.0
Total Solids	12898.0
Volatile Solids	753.0
Fixed Solids	12145.0
Suspended Solids	140.0
Condition	High pH High Solids

[Government trial Exhibit No. 8 (Admitted at —)]

Code 511–1

pH	6.4
Alkanlinity, total as $CaCO_3$ p.p.m	8.0
Alkalinity, (bicarb HCO_3) as $CaCO_3$	—
Alkalinity, (carb CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to acid and Fe-AL salts	8.0
Hardness, total as $CaCO_3$ (EDTA)	164.0
Iron, total Fe	0.1
Aluminum, AL	1.1
Manganese, Mn	0.3
Chloride, CL	8.0
Phosphate, Total PO_4	0.8
Sulphate, SO_4	267.0
Cyanide, CN	0.0
Total Solids	348.0
Volatile Solids	112.0
Fixed Solids	236.0
Suspended Solids	—
Condition of Sample	Potential Acidity

[Government trial Exhibit No. 9 (Admitted at —)]

Code 231–1

pH	7.6
Alkalinity, total as $CaCO_3$, ppm	8200.0
Alkalinity, (bicarb HCO_3) as $CaCO_3$	—
Alkalinity, (carb CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to acid & Fe-Al salts	—
Hardness, total as $CaCO_3$ (EDTA)	0.0
Iron, total Fe	1.4
Aluminum, Al	41.8
Manganese, Mn	0.0
Chloride, Cl	36.0
Phosphate, Total PO_4	0.7
Sulphate, SO_4	3206.0
Cyanide, Cn	0.0
Total Solids	28,782.0
Volatile Solids	3,374.0
Fixed Solids	25,408.0
Suspended Solids	110.0
Condition	High Solids

[Government trial Exhibit No. 10 (Admitted at —)]

Code 230–2

pH	4.4
Alkalinity, total as $CaCO_3$, ppm	0.0
Alkalinity, bicarb HCO_3) as $CaCO_3$	—
Alkalinity, (carb CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to acid & Fe-Al salts	360.0(D)
Hardness, total as $CaCO_3$ (EDTA)	168.0
Iron, total Fe	1.2
Aluminum, Al	98.4
Manganese, Mn	0.8
Chloride, Cl	132.0
Phosphate, total PO_4	0.2
Sulphate, SO_4	270.0
Cyanide, Cn	0.0
Total Solids	1068.0
Volatile Solids	417.0
Fixed Solids	615.0
Suspended Solids	15.0
Condition	Organics High Mn-Cl High Solids

(D) Acidity in terms of acetic acid

[Government Exhibit No. 11 (Admitted at —)]

Code 511-8

pH	5.4
Alkalinity, total as $CaCO_3$ p.p.m	4.0
Alkalinity (bicarb, HCO_3) as $CaCO_3$	—
Alkalinity (carb, CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to or/and acid & Fe-AL salts	12.0
Hardness, total as $CaCO_3$ (EDTA)	180.0
Iron, total Fe	0.0
Aluminum, AL	4.6
Manganese, Mn	1.0
Chloride, CL	8.0
Phosphate, total PO4	0.1
Sulphate, SO4	258.4
Cyanide, CN	0.0
Total Solids (suspended & dissolved)	404.0
Volatile Solids	87.0
Fixed Solids	317.0
Suspended Solids	—
Condition of sample:	Potential Acidity High Mn. Low pH

[Government trial Exhibit No. 12 (Admitted at —)]

Code 231-8

pH	10.0
Alkalinity, total as $CaCO_3$ ppm	16,000.0
Alkalinity (bicarb HCO_3), as $CaCO_3$	—
Alkalinity, (carb CO_3) as $CaCO_3$	—
Free Mineral Acid Acidity	—
Total Acidity, due to acid & Fe-Al salts	—
Hardness, total as $CaCO_3$ (EDTA)	0.0
Iron, total Fe	2.2
Aluminum, Al	83.6
Manganese, Mn	0.0
Chloride, Cl	540.0
Phosphate, total PO4	10.5
Sulphate, SO4	9,768.0
Cyanide, Cn	0.0
Total Solids	46,832.0
Volatile Solids	7,337.0
Fixed Solids	39,495.0
Suspended Solids	320.0
Condition	Turbid Rusty Color High pH. Cl Solids Organics

Supreme Court of the United States

No. 72-624

UNITED STATES, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

Order Allowing Certiorari. Filed December 18, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, pp. 1a-27a) are reported at 461 F.2d 468. The memorandum opinion of the district court on defendant's motion for judgment of acquittal (App. C, *infra*, pp. 29a-41a) is reported at 329 F. Supp. 1118.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1972 (App. B, *infra*, p. 28a). A petition for rehearing was denied on August 21, 1972 (App. D, *infra*, p. 42a). On September 18, 1972, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's alleged failure to institute a formal permit program under the Refuse Act of 1899 (33 U.S.C. 407) with respect to industrial discharges into navigable rivers of refuse which does not adversely affect navigation is, if proved, a bar to criminal prosecutions under that statute for such discharges.

2. Whether the defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that it could with impunity discharge into the Monongahela River refuse not tending adversely to affect navigation is an adequate defense to the present prosecution.

STATUTES INVOLVED

Section 13 of the Rivers and Harbors Act of 1899 (the "Refuse Act"), 30 Stat. 1152, 33 U.S.C. 407, provides in pertinent part:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited * * * from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water * * *: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 16 of the Rivers and Harbors Act of 1899, 30 Stat. 1153, 33 U.S. 411, provides in pertinent part:

Every person and every corporation that shall violate * * * sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500 * * *.

STATEMENT

This prosecution was initiated on April 6, 1971, by the filing of a criminal information alleging that the Pennsylvania Industrial Chemical Corporation ("PICCO") had on four separate occasions discharged from its industrial plant certain refuse matters into the Monongahela River, in violation of 33 U.S.C. 407 and 411. Following a jury trial in the United States District Court for the Western District of Pennsylvania, PICCO was convicted on all four counts; the maximum fine allowable by statute, $2,500.00, was imposed on each count. The court of appeals reversed and remanded the cause to the district court for further proceedings (App. A, *infra*, pp. 1a-27a).

1. At trial, it was stipulated that PICCO was the owner of a manufacturing establishment on the bank of the Monongahela River, a navigable water of the United States, and that the concrete and iron pipes which deposited into that river the alleged refuse matter involved here were also owned by PICCO (App. C, *infra*, p. 30a). The concrete pipe served only PICCO's plant; the iron pipe served the plant and several private residences nearby (*ibid.*).

On the basis of tested samples taken from the discharges at both pipes (App. A, *infra*, p. 3a), the criminal information charged that the effluent was "iron, aluminum, and compounds containing these chemicals, [and others] * * *, and solids * * *."[1]

[1] The criminal information, as amended, is reproduced in the printed appendix filed in the court of appeals at pp. 3a-5a.

A dispute arose at trial over whether the sampled deposits constituted "refuse matter" within the meaning of the Act. PICCO contended that the quoted term covered only matter that would "impede navigation," and thus did not include the liquid solution flowing through its pipes; it also urged that the discharge from its plant was, in any event, nothing more than "sewage," which was specifically excepted from the statutory proscription (App. A, *infra*, pp. 4a-5a).[2] These issues were resolved against PICCO by the district court, which held (1) that the statutory prohibition against the discharge of refuse did not depend on a resulting hindrance to navigation (App. C, *infra*, p. 31a), and (2) that, since "each of the effluents was 'industrial waste,' not 'sewage,'" it was "refuse matter in violation of the Refuse Act" (*id.* at p. 32a). These rulings were affirmed by the court of appeals (App. A, *infra*, pp. 4a-6a).[3]

2. No effort was made by PICCO to obtain a permit from the Secretary of the Army to discharge effluents into the Monongahela River (App. C, *infra*,

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[2] The Refuse Act excepts from its coverage "* * * refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state into any navigable water of the United States * * *" (33 U.S.C. 407).

[3] Both courts below also rejected PICCO's contention that the term "refuse" in the 1899 Act should be defined in light of the water quality standards established pursuant to Section 10(c)(1) of the Water Pollution Control Act of 1948, as amended (33 U.S.C. 1160(c)(1)). "Such a course of action would be unjustified" (App. A, *infra*, p. 8a), the court of appeals held, "[i]n view of * * * significant differences [between the two statutes] in approach, and the 'cardinal rule that repeals [of legislation] by implication are not favored' * * *" (*ibid.*).

p. 30a).[4] The company offered at trial to show, by reference to certain regulations of the Corps of Engineers, that the federal government never had a program for issuing discharge permits under the Refuse Act before December 1970.[5] It further offered to show, on the basis of the Corps of Engineers' alleged enforcement policy under the Act and on the basis of a 1949 conversation between officials of the Corps of Engineers and PICCO purportedly concerning a possible permit application, that it had been affirmatively misled into not applying for a federal discharge permit under the statute (App. A, *infra*, p. 18a). These offers of proof were disallowed by the district court on the ground that they were not relevant to the issue of guilt under the Act (App. C, *infra*, p. 35a). PICCO was convicted on all counts.

3. The court of appeals reversed (App. A, *infra*, pp. 1a-27a). It rejected the district court's construction of the statutory discharge prohibition as oper-

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[4] An offer to prove that PICCO had obtained a discharge permit from the Commonwealth of Pennsylvania was disallowed by the district court (App. C, *infra*, pp. 33a, 40a).

[5] In December 1970, the President announced the establishment of a formal Refuse Act permit program (Exec. Order 11574); regulations implementing that program became effective April 7, 1971 (33 C.F.R. 209.131). Issuance of permits under the new regulations has, however, been enjoined by the District of Columbia district court on the ground that the regulations fail to satisfy all requirements under the National Environental Policy Act of 1969, 42 U.S.C. 4332(2)(C). See *Kalur* v. *Resor*, 335 F. Supp. 1 (D.D.C.). That decision is presently pending on appeal, C.A.D.C., No. 72-1413. See also *Sierra Club* v. *Sargent*, 2 E.L.R. 20131 (E.D. Wash.), appeal pending, C.A. 9, Misc. No. 6086.

ating regardless of the absence of formalized permit procedures. Such a general proscription on the depositing of any "foreign substance" into the navigable waters of this country would, the court concluded (App. A, *infra*, p. 10a), have had a "drastic impact * * * on the nation's economy even in 1899." In its view, a narrower reading of the Act was intended (*id.* at 15a):

> Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a non-existent regulatory program.

Support for this position was apparently found in "Congress' subsequent enactments in the water quality field" (*id.* at p. 10a). The court of appeals stated (*ibid.*) that "[t]here would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and Section 13 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13" (*ibid.*).

As an alternative basis for reversal, a majority of the court held that the district court had erred

in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a federal discharge permit. Establishment of that proposition, it held (App. A, *infra*, pp. 24a-25a), would give rise to a due process defense to the prosecution.*

Accordingly, the case was remanded to the district court to give PICCO "the opportunity to prove the non-existence of a permit program at the time of the alleged offense," or, if unable to establish that, "to attempt to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (App. A, *infra*, p. 25a).

REASONS FOR GRANTING THE WRIT

The narrow construction given by the court of appeals to the Refuse Act of 1899 (Section 13 of the Rivers and Harbors Act) in practical effect repeals that statute and essentially eliminates the most effective weapon that has, until very recently, been available to the federal government in its concerted

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* On this point, one judge dissented. He observed that *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, and *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3), had settled the question of the applicability of the Refuse Act to industrial discharges such as those involved here well before PICCO's alleged violations occurred. "While I agree," he stated (App. A, *infra*, pp. 26a-27a), "that [due process] may require a court to recognize the defense suggested by [the majority] * * *, I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judicial branch of the government has already declared the contrary."

efforts to combat industrial pollution of the Nation's navigable waters. That the discharge of industrial waste into the rivers of this country poses an ever-increasing threat to the rivers themselves, and to the health and welfare of persons touched by polluted waters, has in recent years become so well recognized as not to require extensive discussion.

With the growing national awareness of the magnitude of the problem in this area, the federal government has undertaken an extensive water pollution control program. As an essential part of that program, a large number of suits, such as the one involved here, have been instituted under the Refuse Act of 1899, a statute which, prior to October 18, 1972, provided the only federal criminal sanction against industrial water pollution.[7] This flurry of litigation, which admittedly contrasts sharply with past sporadic enforcement efforts under the Act,[8] is based, *inter alia*, on two decisions of this Court, which emphasize that "* * * the history of [the Act] and of related legislation dealing with our free-flowing rivers 'forbids a narrow, cramped reading' of Section 13." *United States* v. *Republic Steel Cor-*

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[7] On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 (S. 2770) were enacted into law. That statute contains its own criminal enforcement provisions to assure compliance with both its water quality standards and its discharge permit program (see Section 309(c)). See n. 9, *infra*.

[8] See, *e.g.*, *Scow No. 36*, 144 Fed. 932 (C.A. 1); *La Merced*, 84 F. 2d 444 (C.A. 9); *The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (C.A. 2).

poration, 362 U.S. 482, 491; *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226. *Standard Oil* removed all doubt that the statutory term "refuse" includes "all foreign substances and pollutants" (384 U.S. at 229-230). *Republic Steel* established that the Act's prohibition covers industrial discharges of refuse matter, even if deposited into the river by way of sewers (362 U.S. at 490-491); and the Court there held that a civil injunctive remedy is available under the Act to halt illegal discharges (*id.* at 485).

On this authority, both civil and criminal actions under the Refuse Act have been commenced on a major scale in recent years. Of the 128 suits seeking Section 13 injunctive relief that have been brought since 1970, there are approximately 70 still pending. And 115 of the 518 criminal cases commenced during the same period remain undecided. The decision below, if allowed to stand, would apparently call for judgments of acquittal in the pending criminal cases and would raise serious doubt about the availability of civil relief.*

The narrow construction of the Act adopted by the court of appeals thus threatens to dissipate much

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* While the Federal Water Pollution Control Act Amendments of 1972 require a moratorium on future litigation under the 1899 Act until December 31, 1974, or, if sooner, until final administrative action has been taken on permit applications submitted under the new statute (Section 402(k)), they also explicitly provide that pending actions under the earlier statute "shall [not] abate by reason of the taking effect of the amendment made by Section 2 of this Act" (Section 4(a)). The holding of the court below would render this saving provision in the 1972 legislation effectively meaningless.

of the force behind the government's current water pollution control program,[10] and review by this Court is therefore warranted.[11]

1. In holding that the Refuse Act of 1899 contemplates, as a condition to its enforcement against the discharge into navigable waters of refuse matter not harmful to navigation, the establishment by the government of a formal "regulatory program" (App. A, *infra*, p. 10a) permitting such discharges, the court of appeals misconstrued both the plain language of the statute and the clear intent of the legislature as reflected by "subsequent enactments in the water quality field" (*ibid.*).

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[10] The civil enforcement provisions of the Water Pollution Control Act, 33 U.S.C. (1970 ed) 1151 *et seq.*, have heretofore been of limited use in dealing with the serious problems of industrial water pollution. The remedy under that statute, which essentially provided for the establishment of water quality standards for certain of the Nation's waterways, was generally available with respect to a covered waterway only insofar as the pollution had an interstate effect (33 U.S.C. 1160(g)), and only after a 180-day notice period prior to the commencement of litigation (see App. A, *infra*, p. 8a). It may well be, however, that the civil enforcement provisions under the 1972 Amendments to that statute (see n. 7, *supra*) will be more effective once the administrative machinery contemplated by the new Act has been established and the civil remedies become generally available.

[11] We do not believe that the court of appeals' remand order in this case provides a basis for deferring review by this Court of the legal issues presented in the petition. If the district court should on remand resolve the factual questions against the government, it would be required under the court of appeals' legal theory to acquit PICCO on the criminal charges. The government would then be precluded from appealing the case and this Court would be denied an opportunity to review the issues that are now properly before it.

a. By its terms, the Act imposes a ban on the discharge or deposit of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *" (33 U.S.C. 407). As we earlier indicated, this Court has held on at least two occasions that this legislative prohibition must be read "broadly" in order to achieve its fundamental purpose to protect the navigable waters of this country from discharges that are harmful, either because they effectively impede navigation or because they cause pollution. See *United States* v. *Republic Steel Corp.*, *supra; United States* v. *Standard Oil Co.*, *supra.*

The statutory language on which the court below relied, emasculating the clear thrust of the Act's operative provision, is contained in a second proviso to the general prohibition, which reads in relevant part (33 U.S.C. 407; emphasis supplied): "That the Secretary of the Army * * * *may permit* the deposit [of refuse matter deemed not to be injurious to navigation] * * * within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material * * *." As we read this language, and as it has long been construed by those responsible for administering it,[12] the proviso vests in the Secretary of the Army broad discretion—which he has "exer-

[12] Such a long-standing construction by the responsible authority is, of course, entitled to great weight. See *Udall* v. *Tallman*, 380 U.S. 1, 16.

cised * * * from time to time" [13]—to permit on prior application certain river deposits proscribed by the Act. See *United States* v. *Republic Steel Corp.*, 286 F. 2d 875, 879, on remand from 362 U.S. 482. This authority in essence allows the Secretary in isolated instances to immunize from criminal prosecution discharges that are otherwise unlawful. See *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 360 (N.D. Ind.), appeal pending, C.A. 7, No. 72-1590; *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.). It does not, however, require that he take such action; the statutory language in this regard is clearly permissive, not mandatory. In contrast to other portions of the 1899 legislation, the second proviso in Section 13 does not in terms call for a formal regulatory scheme to make the broad anti-dumping provision operative.[14]

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[13] In discussing the permit authority under Section 13, the Corps of Engineers' 1968 revision to its pertinent regulations (33 C.F.R. (1968 ed.) 209.120(d)) stated, as quoted by the court below (App. A, *infra*, pp. 13a-14a):

> (2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152, 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). * * *

[14] Compare Section 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. 404, which authorizes the Secretary of the Army to establish harbor lines beyond which works may not

The court below had no warrant for rewriting the statute to require such a scheme, when Congress had not done so.

Indeed, the decision below stands the statute on its head. What Congress intended generally to proscribe—*i.e.*, the discharge of industrial pollutants (see *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 229-230)—becomes generally permissible. The proviso's *limited* defense to a Section 13 prosecution for discharges which the Secretary in his discretion "may permit," is expanded by the court of appeals into an *absolute* defense in the absence of a regulatory program which Congress did not prescribe. No longer is it enough that the Secretary, consistent with past practice, exercise his "permit" authority informally on the prior submission of a discharge application;[15] he must, under the opinion below, de-

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be extended or deposits made "except under such regulations as may be prescribed from time to time by him." And see Section 4 of the Rivers and Harbors Act of 1905, 33 Stat. 1147, 33 U.S.C. 419, authorizing regulations regarding the transportation and dumping of dredgings. See also Section 402 of the Federal Water Pollution Control Act Amendments of 1972, where Congress has specifically provided for an administrative "permit program."

[15] The court of appeals suggests that PICCO cannot be faulted for failing to seek a federal discharge permit, since requiring it to file an application would merely put it "through a charade * * * for something which did not exist" (App. A, *infra*, pp. 15a-16a). It does not follow, however, that because no formal "regulatory program" exists, no discharge permits issue. As pointed out below (*id.* at p. 14a), the Secretary has not determined "to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse affect on navigation." Rather he has "from time to time" granted

vise a formal "regulatory program" as a condition to any prosecutions for the illegal discharge of pollutants (App. A, *infra*, pp. 14a-15a). Such a broad reading of a proviso—one which essentially removes from the reach of the criminal statute the very activity it was designed to prohibit—is not warranted by any principle of statutory construction. See *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 236-237.[16]

b. We submit, moreover, that later enactments by Congress in the water quality field do not require the result reached below. On at least four separate occasions in the past 24 years, legislation has been passed in this area; Congress has consistently provided, how-

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permission for such discharges to those making prior application (App. A, *infra*, p. 13a). Whether the Secretary would have acted favorably on PICCO's application, had one been submitted, is, of course, open to conjecture on this record, since he was not given the opportunity to consider the matter. But it must be assumed, "contrary to what is argued, that [the] government officials who bear the responsibility [would] not [have] act[ed] arbitrarily or capriciously * * *." *United States* v. *Republic Steel Corp.*, *supra*, 286 F. 2d at 879.

[16] Neither *Brown* v. *State*, 167 S.W. 348 (Tex. Ct. App.), nor *Mitchell* v. *Dixon*, 168 S.W. 2d 654 (Tex. Com. App.), on which the court of appeals relies, support its reading of the statute. Those cases hold that where a licensing statute or ordinance requires the establishment of a board to review license applications to carry on specified activity, and no such board has been established, an individual cannot be convicted for engaging in that activity without a license. By contrast, the Refuse Act, which is a criminal statute, designates the Secretary of the Army as the official to issue permits; there is no requirement that a separate board of review be established; nor is the Secretary required to do more than act on permit applications that are submitted.

ever, that the new statutes are not to be construed as "affecting or impairing the provisions of * * * [section 13] * * * of [the Refuse Act]." [17]

The court of appeals relies primarily on "the program of developing and enforcing water quality standards under the Water Quality Act * * *" (App. A, *infra*, p. 10a) to sustain its construction of the Refuse Act as "a regulatory program rather than a general prohibition" (*ibid.*). The argument apparently is that, since the Water Quality Act contemplates discharges that meet minimum water quality standards, as set forth by state agencies, it would be "fundamentally inconsistent" to read Section 13 as imposing a ban on all pollutant discharges (*ibid.*). But, contrary to the suggestion below, it does not follow from that major premise that the establishment of a formal, regulatory permit program under the Refuse Act is necessary to make that statute "compatible" with subsequent legislation. The 1899 Act explicitly authorizes the Secretary of the Army to act on individual discharge applications submitted to him. In exercising his discretion in this area, he has recently been instructed by Congress not to grant any permit if the proposed discharge fails to meet minimum water quality standards established

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[17] See Section 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113; 33 U.S.C. 1174. And see the similar savings clause in Section 4(a) of the 1972 Act, quoted in relevant part at n. 9, *supra*.

in the Water Pollution Control Act. See Water Quality Improvement Act of 1970, 84 Stat. 108, 33 U.S.C. 1171(b)(1). This limitation on the Secretary's *permit* power, however, in no way undermines the general *prohibition*. There is nothing "fundamentally inconsistent" in banning generally the unauthorized discharge of industrial pollutants into our navigable waters (33 U.S.C. 407), on the one hand, and imposing water quality restrictions on the Secretary with respect to those discharges he deems it appropriate in his discretion to permit (33 U.S.C. 1171(b)(1)), on the other. See *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 916-917 (N.D. Ill.); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind.), appeal pending, C.A. 7, No. 72-1590; *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me.).[18]

2. Finally, we disagree with the alternative ground on which the majority of the court of appeals also relied for reversal: *i.e.*, that PICCO should be permitted to assert as a defense that it was affirmatively misled by the Corps of Engineers into believing that discharges which had no adverse effect on navigation were not covered by the statutory proscription (App. A, *infra*, pp. 17a-25a).

The statute itself makes no distinction between discharges adversely affecting navigation and other

[18] Under the 1972 Act, the authority conferred on the Secretary of the Army under the Refuse Act to permit certain discharges has been rescinded (Section 402(a)(5)). The Environmental Protection Agency has the responsibility under the new legislation to administer the permit program (see Sections 101(d) and 402).

discharges; it bans the depositing into navigable waters of "any refuse matter of any kind or description whatever, other than [sewage]" (33 U.S.C. 407). Even assuming—as did the court below (App. A, *infra*, p. 23a)—that the Corps of Engineers enforcement policy under the Act, as set forth in 33 C.F.R. (1967 ed.) 209.395, had prior to December 1970 (see n. 5, *supra*), "* * * been directed * * * principally against the discharge of those materials that are obtrusive or injurious to navigation," that, we submit, would not provide an adequate basis for recognizing the due process defense raised here.

More than three years before the alleged violations involved in this case, this Court explicity rejected the argument that the Refuse Act prohibits only navigation-impeding discharges. In *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 230, it held that "[t]he word 'refuse' [as used in the Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." As acknowledged by the court below (App. A, *infra*, p. 11a), "following the *Standard Oil* case, it was clear that discharges of refuse not tending adversely to affect navigation were within the scope of Section [13]." And see *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3); *United States* v. *Maplewood Poultry*, *supra*, 327 F. Supp. at 688.

Thus the scope of the criminal prohibition in the Refuse Act had been authoritatively settled well be-

fore PICCO made the present illegal discharges into the Monongahela River. In these circumstances, it is no defense to contend that an administrative policy of enforcement seemed to imply a more restrictive interpretation of the statute. As Judge Stapleton observed in his dissent below on this aspect of the case (App. A, *infra*, pp. 26a-27a): "I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judicial branch of the government has clearly declared the contrary." [19]

[19] In its offer of proof on this point in the district court, PICCO asserted that it was in part misled into misconstruing the statute by the statement of "a member of the Corps of Engineers," who allegedly told an official of PICCO that "no permit would be necessary if the discharges would not impede navigation" (App. A, *infra*, p. 23a). This advice, however, was purportedly given in 1949 (App. A, *infra*, p. 18a), some seventeen years before this Court's decision in *Standard Oil*. At that time, the industrial plant involved here was not even in operation. Thus the statement, if made at all, would have little bearing on the question whether PICCO can properly raise its due process defense in light of the recent decisions by this and other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

RAYMOND N. ZAGONE,
JAMES R. MOORE,
Attorneys.

OCTOBER 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 18, 1972

Before ADAMS, ROSEN, *Circuit Judges* and STAPLETON, *District Judge*

OPINION OF THE COURT

(Filed May 30, 1972)

ADAMS, *Circuit Judge.*

The issues in this appeal center on the parameters of the Rivers and Harbors Act of 1899 with regard to discharges from an industrial plant into the Mo-

nongahela River,[1] whether in the circumstances of this case a crime has been committed within the terms of the Act, and whether, if the Act applies, the conviction in this case comports with due process considerations.

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[1] Section 13 of the Act, 33 U.S.C. § 407 provides:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

In August, 1970, two teachers at the McKeesport Campus of the Pennsylvania State University canoed along the Monongahela River for the purpose of determining whether manufacturing operations on the river were discharging pollutants into it. They took samples on two different days—August 7 and 19—at two outfalls owned by the defendant, Pennsylvania Industrial Chemical Corp. (PICCO). These were sent to the Allegheny County Testing Laboratory for analysis. Based on the results, the United States Attorney filed a criminal information against PICCO[1] on April 6, 1971. Trial commenced before a jury on June 24, 1971, and the jury returned a verdict of guilty on June 29, 1971.

The points with which we deal in this appeal fall into three broad categories: (1) The general applicability of the statute; (2) Its applicability to the particular circumstances of this case; and (3) The due process grounds to be considered even if the statute would otherwise make PICCO's activities criminal.

I. The Statute is Generally Applicable

Before evidence was presented, the district court preliminarily instructed the jury that the Govern-

[1] Based on the data received from the teachers, informations were filed on the same day against United States Steel Corp., Jones & Laughlin Steel Corp., and Wheeling Pittsburgh Steel Corp. Although PICCO elected to go to trial immediately on its indictment, the other three defendants moved to dismiss the indictments against them in the district court. The motions are now in abeyance pending the outcome of this appeal, and the three were granted status as *amici* in this case.

ment, in order to secure a conviction, was required to prove beyond a reasonable doubt that PICCO had discharged "refuse" matter from its plant, that the "refuse" was discharged into a "navigable water of the United States," and that the discharge was not "flowing from streets and sewers and passing therefrom in a liquid state," one of the exemptions set forth in the Act. The parties stipulated that PICCO owned the pipes through which the discharges entered the river, and that the Monongahela River is a "navigable water of the United States", thereby narrowing the issues for the jury.

PICCO first contends that the Act was intended to make criminal only the discharge of refuse which would impede navigation. Although the legislative history is equivocal on this point, we need look no further, however than United States v. Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3d Cir. 1967), for this Court's holding that the Government need not prove that the discharge created an impediment to navigation in order to secure a conviction. There, petroleum products were spilled on the defendant's land, and, by force of gravity, flowed into navigable water. Both sides there agreed that the defendant was not guilty of violating the second clause of section 407, which forbids the impeding or obstruction of navigation. Yet this court affirmed the conviction based on the first clause, dealing with the discharge of "any refuse". Thus, the Act does apply to discharges of the type here in question, and gives no one the right to discharge "refuse matter of any

kind" into "any navigable water of the United States."[8]

Next, PICCO contends that, even assuming arguendo that the industrial wastes discharged by it were "refuse", the portion of section 407 excepting refuse matter "flowing from streets and sewers and passing therefrom in a liquid state" from the coverage of the Act applies to the discharges here in issue as a matter of law. To support this position, PICCO relies on various texts and dictionary definitions written *circa* 1899, the year the Act became law, for the proposition that sewage was commonly defined to include industrial wastes. Congress, however, appears to have had a very different concern when it enacted the exception dealing with refuse matter "flowing from streets and sewers." As one legal scholar has noted:

> "[T]he sewage exception in the 1899 federal Refuse Act was designed to differentiate locally authorized from unauthorized discharges. By excepting refuse 'flowing from streets and sewers . . . in a liquid state,' Congress expressed

[8] Throughout the trial PICCO attempted to show that the matter flowing through its pipes into the river contained solids in solution, rather than suspension, thereby hoping to prove that its discharges would not "impede navigation". The district court sustained certain objections of the Government to these offers, and did not charge the jury that PICCO's discharges must have impeded navigation. In light of the decision in Standard Oil and the above discussion, this proof would not have constituted a defense. PICCO was not entitled to the charge, and, therefore, the trial court did not err in its rulings in this regard.

awareness of the construction of public sewers, taking cognizance of the practice of the day of combining storm and sanitary sewers. The important point was not that waste made it through the system in a 'liquid state', but rather that local authorities had some control over who connected to a sewer system." Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 778 (1971) (footnote omitted); *cf.* United States v. Republic Steel, 362 U.S. 482, 506 n. 27 (Harlan, J., dissenting).

In addition, the definition of sewage suggested by the Supreme Court does not materially differ from that employed by the district court, United States v. Republic Steel, *supra*, at 490. Moreover, to assert, as does PICCO, that any pipe carrying any wastes may be called a sewer, would erode the salutary command of Congress as stated in the Act in favor of a particular exception. As a matter of law, then, liquid industrial waste flowing through pipes into navigable water is not exempt from the proscriptions of the Act.

The final argument advanced by PICCO in this area of statutory interpretation is that unless section 407 is read in conjunction with the Water Pollution Control Act of 1948, 33 U.S.C. §§ 1151 et seq., its amendments of 1961 and 1965, and the Water and Environmental Quality Improvement Act of 1970, a conflict among the statutes is created. PICCO contends that, in order to resolve the conflict, the district court should have defined "refuse" to incorpo-

rate the water quality standards established pursuant to 33 U.S.C. § 1160(c)(1).

Under the Rivers and Harbors Act of 1899, the discharge of *any* refuse is made subject to a permit program while the newer statutes provide that discharges are proscribed only when they exceed the applicable water quality control standards. The federal standards set by the newer water quality statutes rely primarily on those of the states, with the proviso that in certain circumstances a federal standard may be applied. PICCO offered to prove at the trial that it had a permit from the Commonwealth of Pennsylvania to discharge its effluents into the Monongahela River, and that the discharges met the federal standards by complying with the criteria established by Pennsylvania.

PICCO reasons that if the Government prevails on this appeal, PICCO will be branded a criminal under one statute while it meticulously observes a companion provision aimed at the same goal. PICCO contends that we should resolve this apparent conflict by reading all the pollution acts in *pari materia* to reach an accommodation in the same fashion that the Supreme Court in Boys Market v. Retail Clerk's Union, 398 U.S. 235 (1970), reconciled the anti-injunction provision of the Norris-LaGuardia Act, 29 U.S.C. § 104, with the portion of the Labor Management Relations Act directing the federal courts to take jurisdiction in certain labor disputes, 29 U.S.C. § 185(a).

Such a course of action would be unjustified under the circumstances of this case on a number of grounds. It is crucial to note that beginning with the Water Pollution Control Act of 1948, Congress has on four separate occasions in the past 24 years specifically stated that section 407 of the Rivers and Harbors Act, banning "any refuse matter", was not affected by the subsequent legislation.[4]

Moreover, the Rivers and Harbors Act and the Water Pollution Control Act were designed to accomplish what may be viewed as the same end by different means. The Rivers and Harbors Act, by its terms, stipulates criminal penalties; the Water Pollution Control Act provides for civil actions only. The Rivers and Harbors Act may be enforced against those discharging refuse into any navigable water of the United States, while the Water Pollution Control Act may be used only if the pollution has an interstate effect. Finally, under the Rivers and Harbors Act there is no need for the 180-day notice period prior to the commencement of a civil proceeding as required by the Water Pollution Control Act. In view of these significant differences in approach, and the "cardinal rule that repeals [of legislation] by implication are not favored,"[5] the district court was correct when it declined to define "refuse" as used in the Rivers and Harbors Act in terms of the water

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[4] 33 U.S.C. § 1174.

[5] Lynch v. Household Finance Corp., —— U.S. —— (No. 70-5058, March 28, 1972) (slip opinion at 10) *citing* Posades v. National City Bank, 296 U.S. 497, 503 (1936).

quality standards established pursuant to section 1160(c)(1) of the Water Pollution Control Act.

II. The Circumstances Here Demonstrate That No Crime Was Committed

Although we have held above that it would be improper to accommodate the 1899 Act with recent water pollution legislation by redefining the word "refuse" in the 1899 Act, the provision of a permit program in the 1899 Act is important if some sense is to be made of these statutes.

It should first be pointed out that neither United States v. Standard Oil Co., 384 U.S. 224 (1966), United States v. Republic Steel Corp., *supra*, nor United States v. Standard Oil Co. of Puerto Rico, *supra*, dealt with the existence or non-existence of a permit program under the 1899 Act. In *Republic Steel*, it was clear that the discharges impeded navigation and that no permit was sought or held by the company, while in both *Standard Oil* cases the existence of a permit program was irrelevant because of the accidental nature of the discharges involved. For present purposes, the significance of these cases is that the courts there found a congressional intent that all discharges of refuse of any kind, including discharges of refuse which do not adversely affect navigation, should be subject to regulation. They did not, however, find that Congress intended to prohibit all such discharges.

The conclusion that section 407 of the Rivers and Harbors Act was intended to establish a regulatory program rather than a general prohibition is indicated not only by practical considerations relating to the drastic impact that a general prohibition against discharging any "foreign substance" would have had on the nation's economy even in 1899, but also by Congress' subsequent enactments in the water quality field. There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters. Congress, however, obviously thought that the two statutes were compatible or it would not have expressly disavowed any intention to repeal or affect section 407 when it enacted the Water Quality Act of 1965. What makes the two statutes compatible is the permit program contemplated by Section 13. The Government recognizes this fact when it describes the purpose of the 1965 and 1970 water quality acts as follows:

> "Congress sought to establish minimum standards under the new laws; the older law was retained, however (33 U.S.C. § 1174), as a foundation. It announces the federal policy that *no* person or corporation has a *right* to discharge into any navigable stream unless permitted to do so. The new law proceeds to state that such permission may not be granted to one whose

discharge would violate the standards to be established."*

The situation in August of 1970, when the discharges here in issue were made, must be evaluated with this in mind. In short, following the *Standard Oil* case it was clear that discharges of refuse not tending adversely to affect navigation were within the scope of section 407. It was also clear, at least by the time of the enactment of the Water Quality Act of 1965, that Congress intended the Secretary of the Army and the Corps of Engineers to administer section 407 not as a vehicle for protecting navigable waters from all discharges of industrial refuse, but rather as a vehicle for furthering the national conservation policy.

PICCO offered to prove in the court below that the executive branch of the Government simply failed to respond to this congressional directive insofar as it related to discharges having no significance for navigation until December of 1970, when the institution of a permit program under section 407 was announced by the President. There would appear to be substantial support for this contention. From 1965 until December of 1968, the only regulation pertain-

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*While Congress did not until the Water Quality Improvement Act of 1970 add to its water quality control legislation an express prohibition against the granting of a § 407 permit for discharges not meeting the water quality standards, this action was an explicit recognition of what Congress must have assumed when it enacted the Water Quality Act of 1965—that applications for permits under § 407 would be acted upon with an eye to the water quality acts.

ing to section 407 of the Rivers and Harbors Act provided as follows:

> "§ 209.395. *Deposit of refuse.* Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state'. The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation." 33 C.F.R. § 209.395 (1967).

PICCO tendered in evidence a publication of the Corps of Engineers dated March 18, 1968. This publication contains the folowing statements, among others:

> "1. Sections 10 and 13 of the River and Harbor Act . . . is (sic) designed to protect navigation and the navigable capacity of Federal navigable waters and places responsibility for enforcement upon the Department of the Army.
>
> 2. The instructions and program that follow in this paragraph deal with the problem of illegal deposits in navigable waterways under the law which explicitly concerns navigation. The Corps of Engineers has a responsibility for pollution

abatement and is carrying out that responsibility under various other media.

3. The concern of the Department of the Army in industrial waste under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for moving these shoals on those industries that are causing them."

In December of 1968 the Corps of Engineers of the Department of the Army published a complete revision of Part 209 of the Code of Federal Regulations. While the revision served notice that the Corps of Engineers would consider pollution and other conservation factors in passing on applications under sections 9 and 10 of the Rivers and Harbors Act for permits for "work in navigable waters" (33 C.F.R. § 209.120(d)), the sole reference to section 407 again described it in terms limited to problems of navigation:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered prefer-

able to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U.S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 C.F.R. § 209.200(e)(2).[7]

This version of Part 209 remained in effect in August of 1970.

The materials which PICCO submitted to the district court appear to indicate that the agency responsible for administering the regulatory program under Section 13 made no determination that its congressional commission required it to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse affect on navigation. Nor would the absence of a permit program in this area appear to be the product of a temporary administrative moratorium pending development of appropriate policies and procedures. Rather it would appear that the Corps of Engineers, perhaps as a result of a mistake of law, made a conscious decision to

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[7] The Corps' § 4 jurisdiction was described in the preceding paragraph as follows:

"(1) Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419), authorizes the Secretary of the Army to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings and other refuse materials *whenever in his judgment such regulations are required in the interest of navigation.*" (Emphasis supplied) 33 C.F.R. § 209.200(e)(1).

decline to undertake the responsibility imposed upon it by Congress.

There is a certain appeal to the crisp conclusion of the district court that Congress intended criminal penalties for one who discharged without a permit and that PICCO concededly had no permit. When viewed in the context of this case and tested with the touchstone of congressional intent, however, this analysis produces an unsound result. Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a nonexistent regulatory program.[8] The members of Congress who enacted the Water Quality Acts of 1965 and 1970 with their "saving provisions" for section 407 of the Rivers and Harbors Act might well be astonished by the broad implications inherent in the judgment of conviction entered below.

Similarly unsound is the Government's contention that the absence of a permit program is irrelevant because PICCO never applied for a permit. If PICCO proves what it has offered to prove and if, as we have

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[8] Research has revealed only one case where the prosecuting authorities have pressed criminal charges under comparable circumstances. The conviction was overturned. Brown v. States, 74 Tax Cr. R. 108, 167 S.W. 348 (Ct. App. 1914). See also Mitchell v. Dixon, 168 S.W.2d 654 (Texas Com. App. 1943).

concluded, Congress did not intend to make failure to comply with a nonexistent program a crime, we do not believe that the axe can stay or fall depending upon whether the defendant did or did not go through the charade of making an application for something which did not exist.

Out of an abundance of caution, we hasten to add that what we have said would have no relevance whatever to any discharge occurring after the implementation of the permit program.[9] Compliance with the water quality standards should not, of course, be a defense to an action brought under section 407 against one who has discharged without a permit. Congress intended that the executive branch of the Government have advance notice of proposed discharges and an opportunity to determine whether such discharges will be consistent with national policy. Accordingly, one who discharges without a permit undermines the program regardless of the character of the discharge. There is a vast difference, however, between a conviction of one who fails to secure an available permit and a conviction of one who fails to secure a permit which is unavailable.[9a] If

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[9] We do not intend to convey the impression that by reversing the conviction here we are indifferent to the need for environmental improvement. However, because federal water quality standards may be forced vigorously as soon as a permit program is implemented, our decision today should have very little effect on the ecological well-being of our nation in the future, and, in fact, this case will have only small implications for the past.

[9a] *See, Sanders, The Refuse Act of 1899; Key to Clean Water*, 58 A.B.A.J. 468, 469 (1972).

this case falls in the latter category, we hold that PICCO has been convicted of a crime which Congress has never created.

III. Even If The Act of 1899 Were Construed To Make PICCO's Activities Criminal, Due Process Considerations Would Require A Reversal

Because of the importance of this case in the ecology field, we are constrained to set forth an alternative basis for our order directing a reversal of the conviction and a remand.[10] The proposition is advanced that when we take together the vagueness of the Act, its history, the administrative interpretation of the Act by the Corps of Engineers, and other actions of the Government, it would be unreasonable to expect an individual or a corporation to conclude that the Act would apply to industrial discharges not affecting navigation.

One of the important aspects of PICCO's contentions relates to the portion of section 407 that authorizes "The Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, [to] permit the deposit of any material above mentioned in navigable waters * * *" The Government agrees that possession of a permit issued by the Secretary would constitute a complete defense to the prosecu-

[10] We are quick to point out that because of the nature of our alternative basis for decision, certain of the rationales advanced here may appear to be inconsistent with those set forth in Part II, *supra*.

tion. The uncontradicted testimony of Mr. William Johnston, a Vice-president of PICCO, showed that at least since 1944 no permit program had been established by the Corps of Engineers for discharges into the Monongahela River. In fact, it was not until December 23, 1970, more than four months after the commission of the act alleged in the indictment, that by Executive Order 11574, 35 Fed. Reg. 19627, the President announced the institution of a permit program under section 407 to achieve compliance with federal water quality standards. Mr. Johnston also testified that in 1949 he had spoken with an individual in the Corps of Engineers office in Pittsburgh and that as a result of that conversation, PICCO never applied for a permit to discharge refuse into the river. PICCO thus takes exception to that portion of the district court's charge which stated, "But it is not the contention of the Defendant that the act was done unknowingly or unintentionally." PICCO objects on the basis that it was acting in a manner consistent with what it thought the law required, and that Mr. Johnston had been told by a member of the Corps of Engineers that the statute did not require a permit for the discharge of industrial wastes not affecting navigation.

The test to determine whether these facts, if true, would be sufficient to make out a due process violation is set forth in the leading case of Connally v. General Construction Co., 269 U.S. 385, 391 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform

those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In the situation presented here, however, PICCO claims it was misled by interpretation given to the statute by the Corps of Engineers, the body primarily responsible for the navigable waters of the United States.[11] *Cf*, United States v. Painter, 314 F.2d 959 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); United States v. Mancuso, 139 F.2d 90 (3d Cir. 1944). There is evidence that prior to December, 1970, the Corps

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[11] Adding to the claimed confusion is the Water Quality Act of 1965, according to which if PICCO obeyed state standards and obtained a state permit, its discharges would not be subject to abatement. Although we held above that PICCO's belief was erroneous that it was not in violation of § 407 because of its alleged compliance with the 1965 Act, PICCO's belief appears not to have been unreasonable or held in bad faith. Moreover, PICCO asserts that to accept the Government's view of the Act, might well create a confiscatory impact. If it is true that no discharge permits have been available from the Corps of Engineers, every industrial concern along the Monongahela, and perhaps throughout a substantial portion of the nation, which uses water from navigable waters in the operation of its plant and puts back something other than pure water would be in violation of the Act. Indeed, for practical purposes, many of these plants might not be able to operate at all.

of Engineers, in its published regulations, had consistently interpreted section 407 to require a permit for industrial discharges only when the effect of the discharges would be to impede navigation, *e.g.*, a deposit of solids on the river bed tending to lower the water level of a navigable channel. The only reference to section 407 in the Corps' regulations governing the issuance of the various permits under the 1899 Act is found at 33 C.F.R. § 209.200(e), reproduced *supra* at 14. Moreover, in an internal regulation published in March, 1968, reproduced *supra* at 14, the Corps noted its concern for navigation only. Because this Court must give great weight to the consistent interpretation of a statute by the agency primarily responsible for its enforcement, Udall v. Tallman, 380 U.S. 1, 16 (1965), PICCO also should be permitted to rely on the Corps' reading of section 407.

It is the position of the Government,[12] on the other hand, that the statute does not require a showing of scienter—criminal intent—and the mere lack of a permit program should not constitute a defense to a criminal charge under section 407.

In its two major decisions concerning the 1899 Act the Supreme Court has not given any indication whether scienter may be a necessary element of the

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[12] Although the Government points to a Corps pamphlet published in 1968 to show its concern with pollution, we do not find the passage to convey clearly the meaning ascribed, and we have grave doubts that PICCO can be held to have knowledge of such materials. *See* Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).

offense under section 407. United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960). In fact, in the *Standard Oil* case, the Court specifically left open the scienter question. 384 U.S. at 230. The Government conceives PICCO's argument as encompassing nothing more than the traditionally rejected defense that ignorance of the law is an excuse.

PICCO does not claim that it did not know the law existed. Its proofs showed that it was well aware of section 407. Rather, PICCO asserts that it was affirmatively misled by the Corps of Engineers to believe that the Act would be inapplicable to discharges of waste that did not impede navigation.

Thus the assertion is not that PICCO was ignorant of the law's application to it and therefore lacked scienter. Instead, it is contended that had it not been for misleading behavior—whether intentional or not—of the Corps of Engineers, PICCO would have been able to decide if it should apply for a permit from the Corps, and depending on the Corps' response to an application, PICCO could have planned its behavior accordingly.

It might be maintained that, if nothing else, the Supreme Court's decisions in *Republic Steel* and *Standard Oil* should have given PICCO notice that it was in violation of the 1899 Act. In *Republic Steel*, it is clear that the industrial discharges impeded navigation contrary to the command of the second clause of section 407. PICCO has claimed throughout the litigation, and the claim is uncon-

tradicted, that its discharges have no navigational effect. *Standard Oil*, on the other hand, dealt with the accidental discharge of aviation fuel, and the Court decided only that commercially valuable substances could be "refuse" for purposes of section 407. Similarly, our decision in United States v. Standard Oil of Puerto Rico, *supra*, is insufficient to have made PICCO aware of its alleged continuing violation of the Act. The issue there was whether the defendant could be responsible for gasoline deposited into navigable waters not directly and intentionally, but which had spilled on defendant's land and by force of gravity flowed into the water. That the 1899 Act has been employed to prosecute one-time accidental deposits of refuse has been clear for some time. *See, e.g.*, La Merced, 84 F.2d 444 (9th Cir. 1936). No decision has been brought to our attention, however, holding criminally responsible an industrial firm whose discharges were not one-time accidents or whose day-to-day discharges had no navigational effect.

In much the same way, the Government's contention that lack of a permit program will not constitute a defense misses the point here. We are presented with much more than the mere absence of a permit program. To begin, it was not unreasonable for PICCO to read section 407 as permitting the discharge of wastes not affecting navigation. The Corps of Engineers, in published regulations, appeared to read the Act in the same way. Until 1970, the Department of Justice concurred in this inter-

pretation of the Act. According to an Assistant Attorney General, "Only until early last year, this statute was administered in the Department of Justice strictly as a criminal statute and it was usually applied to discharges into the navigable waters of the United States which impeded navigation." *Proceedings, Refuse Act of 1899*, 30 Fed. B. J. 327, 328 (1971). When we add to this the proffered testimony of Mr. Johnston that a member of the Corps of Engineers told him no permit would be necessary if the discharges would not impede navigation, it is clear that PICCO does not rely on the mere lack of a permit program. It relies, rather, on the alleged fact that it was affirmatively misled into not applying for a permit.[18]

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[18] In this regard it is interesting to note that if the Federal Criminal Code proposed by the National Commission on Reform of Federal Criminal Laws were the law, PICCO would appear to have a defense under § 609 which reads:

> "Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:
>
> (a) a statute or other enactment;
>
> (b) a judicial decision, opinion, order or judgment;
>
> (c) an administrative order or grant of permission; or
>
> (d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime."

As explained in *Working Papers*, National Commission on Reform of Federal Criminal Laws 138 (1970),

[Footnote continued on page 24a]

In such circumstances, the apparent position of the Government may well have been unfair to the point that PICCO's conviction violated due process.[14] The concept of fair play is implicit in our basic notions of what is meant by due process of law. In this regard, an individual or corporation should not be held criminally responsible for activities which could not reasonably have been anticipated to be il-

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[13] [Continued]

> "If a defense or reasonable reliance on a competent (official or unofficial) statement of the law is omitted, prosecutors can be counted on to decline prosecutions where the defense would be plainly and fully applicable. There are, indeed, remarkably few reported cases in which the defense has been at issue. Judges will not be likely to impose severe sentences in the cases brought by a too zealous prosecutor. Nevertheless, a person who would not have violated the law if his reasonable understanding of the law, gained by his own efforts to obtain legal advice or from reliable official statements, had not been mistaken should not find himself in the position of having to depend on the prosecutor's or trial judge's decision not to prosecute for a crime which, in law, he committed."

In this case, the prosecutor did elect to proceed and PICCO was given the maximum fine.

[14] It should also be pointed out that even the Attorney General of the United States, when considering the purpose of a direct predecessor of the 1899 Act, stated:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been made in the improvement of the river." 21 Opp. Atty. Gen. 305, 308 (1896).

legal based on 70 years of consistent government interpretation and subsequent behavior. *Cf.*, Bouie v. City of Columbia, 378 U.S. 347, 351 (1964); United States v. Harriss, 347 U.S. 612, 617 (1954). We hold, in the alternative, therefore, because evidence which would have been relevant to PICCO's defense was incorrectly excluded by the district court and because the jury was not instructed regarding such defense, that PICCO is entitled to a new trial.[15]

IV. Proceedings On Remand

Based on our holding in Part II, *supra*, PICCO should be given the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses. Should the evidence show that, in fact, a permit program did exist at the relevant time, then, based on Part III, *supra*, PICCO should be allowed to attempt to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation.

Accordingly, the judgment of conviction will be reversed and the cause remanded to the district court for proceedings consistent with this opinion.

STAPLETON, *District Judge*, Concurring.

I concur in the views expressed in the first two sections of the majority's opinion. I am unable, however, to subscribe to the views stated in the third section of that opinion.

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[15] The holdings of parts II and III of this opinion are limited to the record with which we have been presented.

In *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) the Supreme Court of the United States concluded that "the word 'refuse' [as used in Section 13 of the Rivers and Harbors Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the water course." In *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 671 (3rd Cir. 1967), this Court followed suit by upholding a conviction under Section 13 in a case where there was no evidence that the discharge might adversely affect navigation. I find it difficult to assign to these pronouncements the limited significance given them in the third section of the majority's opinion.

As I read this portion of the majority's opinion, it holds that despite the pronouncements of the courts in these cases, PICCO may successfully assert a defense that it was affirmatively misled by the regulations of the Corps of Engineers into believing that Section 13 did not apply to discharges which would not adversely affect navigation. While I agree that the Due Process Clause may require a court to recognize the defense suggested by Section 609 of the proposed Federal Criminal Code and may encompass a theory of estoppel even in criminal cases,[1] I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judi-

[1] See Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L. J. 1046 (1969).

cial branch of the government has clearly declared the contrary.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, A Corporation, APPELLANT

(D.C. Criminal No. 71-75)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and ROSEN, *Circuit Judges*, and STAPLETON, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of said District Court, filed July 30, 1971, be, and the same is hereby reversed, and the cause remanded for proceedings consistent with the opinion of this Court.

ATTEST:

Thomas F. Quinn (signature)
Clerk

May 30, 1972

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 71-75 Criminal

UNITED STATES OF AMERICA

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, a Corporation

MEMORANDUM OPINION

HUBERT I. TEITELBAUM, District Judge

The defendant, Pennsylvania Industrial Chemical Corporation ("PICO"), was convicted on four counts of discharging refuse matter into a navigable water of the United States in violation of 33 U.S.C. § 407, commonly known as the Rivers and Harbors, or Refuse, Act of 1899.[1] The defendant filed no post-

[1] Section 407 of 33 U.S.C. provides, in pertinent part, that, "[I]t shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . [provided that] the Secretary of the Army, whenever in the judgment of the Chief of

trial motions. However, in view of the novelty of the legal issues involved, it is deemed appropriate to file this memorandum opinion; focusing, in part, on matters raised on defendant's Motion for Judgment of Acquittal.

Factually, the issues were few and simple. The information charged PICO, in four counts, with discharging and depositing refuse matter into the Monongahela River. Counts I and II dealt with effluent sampled from a certain concrete pipe on August 7 and 19, 1970, respectively, and Counts III and IV dealt with effluents sampled from a certain iron pipe on August 7 and 19, 1970, respectively. It was stipulated that PICO was the owner of a manufacturing establishment (a chemical plant) situated on the banks of the Monongahela River, that the concrete pipe and the iron pipe from which the discharges were sampled were owned by PICO, and that the Monongahela River is a navigable water of the United States. It was uncontroverted that while the concrete pipe served not only the defendant's manufacturing establishment but also a nearby residential area comprised of approximately six to eight houses, the iron pipe served the defendant's chemical plant exclusively. It was further uncontroverted that the defendant had not secured and in fact, had not applied for, a permit prior to the discharges. The con-

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Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters . . . provided application is made to him prior to depositing such material. . . ."

troverted factual issues were as to the nature of the sampled discharges. The Government's expert characterized each of the samples as "industrial waste." The defendant's expert expressed skepticism at conclusively characterizing the effluent sampled from the concrete pipe on August 7, 1970 as "industrial discharge." He conceded that the other three samples were properly characterizable as "industrial discharge." He distinguished, however, between "industrial waste" and "industrial discharge." He treated "industrial discharge" as a term applicable to the effluent from the time it left the pipe until it reached the river and considered that whether or not it was "industrial waste" depended upon its effect upon the river. As applied to the instant case, this is a distinction without a difference. The Refuse Act prohibits the discharge of *any* refuse matter, regardless of its effect, without a permit. This blanket prohibition is a clear expression of Congressional concern with the cumulative effect of many individually insignificant discharges. Thus, the effect of the particular effluent upon the river is irrelevant and testimony concerning it was excluded. When the Congress interdicted "any" discharge, it meant just that: that without a permit absolutely *no* amount of discharge was lawful. The defendant's suggested definition of refuse matter relating to the effect on the navigable water of the "industrial discharge" will be further dealt with hereinafter with regard to the defendant's Motion for Judgment of Acquittal.

The Court's charge to the jury defined "refuse matter" as encompassing, in *any* amount, all foreign

substances and pollutants, except those flowing from streets and sewers in a liquid state, including industrial waste. This composite definition, which undoubtedly undermined the defendant's distinction, was taken directly from the decisions of the Supreme Court in *United States* v. *Standard Oil*, 384 U.S. 224 (1966) and *United States* v. *Republic Steel*, 362 U.S. 482 (1960). The excepted refuse matter, i.e., that flowing from streets and sewers and passing therefrom in a liquid state was defined to the jury as meaning, "sewage," which again, was taken directly from *Republic Steel* in which the Supreme Court stated that,

> "[R]efuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'"

"Sewage" was defined to the jury as, generally, that water, filth, and feculent matter deriving usually from human and domestic waste, but not including industrial waste.[2] Not surprisingly, the jury's finding, which must be construed, in conformity with the jury's verdict, in the light most favorable to the Government,[3] was that each of the effluents was "industrial waste," not "sewage," and therefore refuse matter in violation of the Refuse Act.

The defendant's Motion for Judgment of Acquittal at the close of the Government's case and renewed,

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[2] This definition was forged from discussions found at 25 Am. Jur. 2d, Drains and Drainage Districts § 1, 39 Words and Phrases 100, and the cases cited therein.

[3] *Glasser* v. *United States*, 315 U.S. 60 (1942).

in effect, after the close of all of the testimony, was based essentially on three grounds: (1) that both the concrete and iron pipes were "sewers" and therefore the refuse matter flowing therefrom was excepted from the prohibition of the Refuse Act; (2) that by the terms of the regulations adopted pursuant to the Refuse Act by the Secretary of the Army on April 7, 1971, the defendant had until July 1, 1971, to secure a permit to discharge refuse matter; and (3) that the matter which the defendant was discharging was in complete compliance with the water quality standards established by the Commonwealth of Pennsylvania and therefore not violative of the Act. The relevance of the regulations adopted by the Secretary and the water quality standards established by Pennsylvania, additionally, dogged the trial in the form of evidentiary offerings and rulings. At the trial both of them were regarded as irrelevant and were excluded from the evidence. An examination of each of these contentions follows:

I. The Definition of the Excepted Refuse Matter

The defendant sought to define the excepted refuse matter as including any and all matters flowing in a liquid state from an underground conduit. To support its definition, it offered Webster's definition of "sewer": an artificial usually subterranean conduit to carry off water and waste matter. That definition is not doubted. The word "sewer," however, does not stand alone in the exception. It is refuse matter

which flows from streets and sewers and passes therefrom in a liquid state which is excepted. And that refuse matter meant to the Supreme Court in *Republic Steel* simply "sewage." What becomes important, then, in determining what refuse matter is excepted is the determination not of the construction or location of a particular conduit, but rather what it carries off. Therefore, the defendant's offered definition and effect of the term "sewer" was rejected, and *Republic Steel's* definition of the excepted refuse matter was submitted to the jury. Defendant's contention that anything which flows from a pipe is excepted from the interdiction of the Act is untenable.

II. The Relevance of the Absence of an Established Permit Program

The second ground of the defendant's contentions was that by virtue of the regulations[4] adopted by the Secretary of the Army on April 1, 1971, it had until July 1, 1971, to secure a permit to discharge refuse matter. Proposed and adopted expressly to establish a procedure for the issuance, pursuant to § 407 of the Refuse Act, of permits for discharges or deposits into navigable waters, the regulations, by § 209.131 (d)(3), clearly provide that all persons who are required by § 407 to secure a permit must do so no later than July 1, 1971. This provision, the defendant argued, implicitly suspended the enforcement of the

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[4] The regulations, contained in § 209.131 of Part 202, Chapter II, Title 33 of the Code of Federal Regulations, were published at 36 Fed. Reg. 67, p. 6564 *et seq.*

Refuse Act until that date. Section 209.131(d)(4), however, uncompromisingly refutes that contention. That subsection provides that,

> ". . . the mere filing of an application requesting permission to discharge or deposit into navigable waters or tributaries thereof will not preclude legal action in appropriate cases for Refuse Act violations".

Nothing could be more clear.

Alternatively, the defendant argued that the Government's admitted failure to estalish permit procedures (particularly its failure to adopt application forms) under the Refuse Act until 1971 estopped its enforcement in 1970. The argument is not that the defendant had applied for and was denied a permit or that it attempted to apply for a permit and was unsuccessful. The defendant admitted that it had never attempted to secure a permit. The argument is simply that since the permit provision of the Refuse Act was neglected by the Government, the defendant was similarly entitled to neglect it. The language of § 407 disputes that entitlement. It provides that *prior* to the discharge of refuse matter, application must be made *to* the Secretary of the Army. It does not make it incumbent upon the Government to solicit applications; it makes it incumbent upon whomever proposes to discharge refuse matter to apply for a permit. Therefore the absence of an established procedure regarding the issuance of permits was deemed irrelevant.

III. The Interrelationship of the Refuse Act With Pennsylvania's Water Quality Standards

More problematical, though ultimately equally ill-founded, is the defendant's third contention. By it, the defendant contended that all of the matter discharged satisfied the water quality control standards of the Commonwealth of Pennsylvania and that, therefore, the Refuse Act was not violated. The defendant also sought to introduce the standards into evidence. Both the contention and the offer were rejected.

The heart of the defendant's argument was that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 to 1175, which was enacted into law by Congress in 1948 and amended as late as 1970, was a more contemporary Congressional decree on the subject of discharge into or pollution of navigable waters of the United States, and that therefore in harmonizing any conflicting policies of the Refuse Act with that Act, the former should be accommodated to the latter. The issue is not to be confused with that of whether or not the Refuse Act was designed to curb or control pollution of the nation's navigable waters. That issue was foreclosed by the Supreme Court in *Standard Oil* when it squarely and unmistakably resolved that the injury to the nation's waters "sought to be remedied was caused . . . in part by pollution".[5]

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[5] This construction first appears in *La Merced*, 84 F.2d 444 (C.A. 9, 1936) and was recently the clear holding in *United States* v. *U. S. Steel*, Criminal No. 70 H Cr. 12 (N.D. Ind.,

Additionally, the decision of this Circuit in *United States* v. *Esso Standard Oil Co.*, 375 F.2d 621 (C.A. 3, 1967) is founded upon the assumption that § 407 is for the purpose of preventing pollution as well as insuring unobstructed navigation. This Court cannot reopen that issue. The issue here is whether or not the Water Pollution Control Act sets up standards by which discharged matter may be determined to be or not to be refuse matter within the meaning of the Refuse Act.

The short answer to that inquiry is found in § 1174 of the Water Pollution Control Act. Enacted into law as a part of the 1965 amendments, and amended in 1970, § 1174 provides that the Water Pollution Control Act shall not be construed as "affecting or impairing the provisions of Section[s] 407". If, as must be assumed, the 1970 amendments were with full awareness of the Supreme Court's decision in *Standard Oil*, it seems obvious that the Congress chose to maintain rather than retrench from the provisions of § 407 as judicially interpreted.

The long answer is to consider the substances of the two Acts. The announced purpose of the Water

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Nov. 10, 1970) and *United States* v. *Maplewood Poultry Co.*, Criminal Nos. 5290, 5293, 5291 and 5299 (D. Me., June 10, 1971). The only reported decision construing § 407 to the contrary appears to be *Guthrie* v. *Alabama By-Products Company*, Civil No. 71-21 (N.D. Ala., June 21, 1971) in which the Court, confronted with a suit by lower riparian landowners seeking to assert a private right of action under § 407, decided that since the Refuse Act was designed to protect navigation rather than prevent pollution no private right of action inured to the plaintiffs.

Pollution Control Act is "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution". If, as the Supreme Court has stated, the Refuse Act was at least partially intended to prevent pollution, the two Acts coincide in purpose. What differentiates them is the approach which each takes to achieve its purpose.

The approach of the Water Pollution Control Act, by the 1965 amendments, is to encourage individual states to establish "water quality criteria" which at the instance of the states the Federal government will enforce.* The act contemplates the adoption by the Federal government of acceptable state standards. Alternatively, the Act empowers the Federal government to establish standards. In addition to subjecting transgressors of state established and Federally adopted standards to abatement procedures, the Act requires, by § 1171(b)(1), that any applicant for a Federal permit to engage in an activity "which may result in any discharge into the navigable waters of the United States" shall provide the permitting authorities with certification from the state water pollution control agency that there is reasonable assurance that such discharge will not violate the applicable water quality standards. Without such certification, or if such certification is denied, no permit is issuable. To complement this provision, the regulations adopted by the Secretary of the Army on

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* See, particularly, 33 U.S.C. § 1160.

April 7, 1971, regarding permits for discharge or deposits into navigable waters pursuant to the Refuse Act forbid the issuance of a permit thereunder if an applicant is required to obtain state certification that its proposed discharge will not violate applicable water quality standards (as the Water Pollution Control Act requires) and such certification was denied.

Such certification, however, is by no means the sole determinant of the issuability of a permit. The regulations allow for the denial of a permit on several other grounds, including the impact on fish and wildlife and the risk to health or safety. Although the regulations command the Army Corps of Engineers to accept the findings of the Administrator of the Environmental Protection Agency (the agency responsible for the administration of the Water Pollution Control Act) respecting the applicable water quality standards and related water quality considerations, they empower the Corps of Engineers to make independent findings as to the other considerations relevant to the determination of whether or not a permit should issue. The supplemental independent authority given the Corps of Engineers suggests that the standards of the Water Pollution Control Act were intended to assist rather than supplant the application of the Refuse Act. Indeed the standards under the Refuse Act are more stringent. The apparent and logical purpose of the Congress in retaining the Refuse Act is to apply its permit provisions to obtain advance assurances of compliance with the

standards of the Water Pollution Control Act. The harmony between the two Acts therefore, if imperfect, is not improbable.

The defendant's additional argument is that the Refuse Act makes a crime what the Water Pollution Control Act authorizes. This argument overlooks the permit provisions of the Refuse Act which are, in effect, its saving grace. The Refuse Act prohibits only the discharge of refuse matter into navigable waters without *first* securing a permit. Again, the standards under the Water Pollution Control Act come into play in determining whether or not a permit should issue. And that is a matter exclusively for the Corps of Engineers, not a jury. Thus, to deem the water quality standards of Pennsylvania relevant in determining whether or not matter discharged into navigable waters is "refuse matter" within the meaning of the Refuse Act in a criminal proceeding would require a judicial restructuring of the Congressional scheme. See *United States* v. *Interlake Steel Corporation*, 297 F. Supp. 912 (D.C. N.D. Ill., E.D., 1969). Therefore they were rejected.

For these reasons the defendant's Motion for Judgment of Acquittal prior to verdict was denied and the offer of evidence of the absence of either an established permit procedure or application forms for

permits and of the water quality standards of Pennsylvania were rejected.

/s/ Hubert I. Teitelbaum
HUBERT I. TEITELBAUM
United States District Judge

Date: July 26, 1971

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1840

UNITED STATES OF AMERICA

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORP.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, HUNTER, *Circuit Judges*, STAPLETON, *District Judge*

The petition for rehearing filed by United States of America in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Arlen M. Adams
Judge

Dated: August 21, 1972

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No. 72-624

IN THE

Supreme Court of the United States

October Term, 1972

UNITED STATES OF AMERICA,
Petitioner,

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

JEROME M. LIBENSON,
HAROLD GONDELMAN,
HERBERT B. SACHS,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8718,
Attorneys for Respondent.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-624

UNITED STATES OF AMERICA,
Petitioner,

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The criminal informations charged Pennsylvania Industrial Chemical Corporation (PICCO) with discharging and depositing refuse matter into the Monongahela River on August 7 and 19, 1970. PICCO had operated its plant on the Monongahela River since 1949 (Petitioner's Appendix, 18a).

PICCO, at the trial, offered to prove that it had been granted a permit by the Commonwealth of Pennsylvania to discharge its industrial wastes into the Monongahela River,

which permit had been granted on June 27, 1956. PICCO further offered to prove that the standards set by the Commonwealth of Pennsylvania had been adopted by the Federal government as applicable to Federal regulations (18 C. F. R., Chapter V, 620.10) and that the contents of the evidence obtained on August 7 and 19, 1970 contained chemicals below the authorized limits of the State standards as adopted by the Federal government. It was, therefore, the contention of PICCO, as a defendant in a criminal jury trial, that it had a right to show as a defense that the alleged violations were not violations at all since the prosecution was attempting to convict PICCO of a crime of not having a permit while at the same time refusing to permit PICCO to show (1) that its industrial waste discharges were within the water quality control standards of the State and Federal government and (2) that the Federal government itself had not instituted a permit program under the Act of 1899, which was the Act under which PICCO was being prosecuted.

Petitioner states that no effort was made by PICCO to obtain a permit from the Secretary of the Army to discharge effluents into the Monongahela River. The Court of Appeals for the Third Circuit properly found that PICCO was not required to do a useless act, to-wit, apply for a non-existent permit from a non-existent permit program.

The fact that there was no permit program set up by the Corps of Engineers or the Secretary of the Army under the Act of 1899 seems to be known to everyone but the Department of Justice. The first Federal implementation of a permit program is found in the Presidential Proclamation issued December 23, 1970, 35 F. R. 19627. Section 1 of the Presidential Proclamation states, for the first time since 1899, that:

> "The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as 'the Act') to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks."

The Council on Environmental Quality is directed to coordinate the regulations and procedures relative to the permit program, and the "Administrator" when used throughout the Presidential Proclamation means the Administrator of the Environmental Protection Agency.

On April 7, 1971, Federal Register, Vol. 36, No. 90, pages 6564, *et seq.*, the first rules and regulations ever issued by the Corps of Engineers, Department of the Army, were promulgated implementing the Presidential Proclamation and establishing administrative procedure for permits for discharges or deposits into navigable waters. On May 4, 1971 Mr. William D. Ruckleshaus, Administrator of the Environmental Protection Agency, promulgated regulations relating to the state certification of activities requiring a Federal license or permit, F. R., Vol. 36, No. 90, page 8563. The certifying agency under these regulations is the State agency of the Commonwealth of Pennsylvania which issued the State permit to PICCO and, as already stated, the certification and standards of the Pennsylvania agency had already been accepted by the Federal government.

Finally, Mr. Ruckleshaus, in an interview reported in Volume 5, Number 5, May, 1971, of Environmental Science & Technology, page 392, stated:

> "It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. *They couldn't get one if they*

wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream." (Emphasis added)

The regulations of the Corps of Engineers, Department of the Army for 1939 and 1968 were offered in evidence but refused by the court below to show that the Corps of Engineers through 1970 discussed permits in connection with navigable waters only as permits "for work in navigable waters" or "applications for authority to execute work or erect structures in the navigable waters of the United States". It was not until 1971 that the Department of the Army, Corps of Engineers, issued a circular for "permits for work and structures in and for discharges or deposits into navigable waters". Furthermore, the Army, in the circulars referred to, through its circular of 1968, which was not supplanted until 1971, continued to refer to the requirement of permits for discharges in navigable waters which interfere with navigation and the responsibility of the Army to attempt to have industry share in the cost of the removal of such solids which would interfere with navigation. No mention is made of stopping industrial waste discharges which do *not* interfere with navigation.

The Court of Appeals for the Third Circuit also had before it the following facts set forth in PICCO's brief on appeal to that Court: In 1890, the population of the United States was 62,947,714;[1] the rural population of the United States was 40,481,499, or 65% of the total, while the urban population was 22,106,265, or 35% of the total.[1] The manufacturing work force in the United States was 4,850,000. The total payroll of those engaged in manufacturing pro-

[1] 1960 Census of the Population; United States Summary, Table 3 (pp. 1-4).

cesses was $2,258,700,000.[2] The gross annual product for the years 1893 through 1899 was $13.5 billion in current prices.[3] The population of Allegheny County was 775,058.[4] These were the conditions prevailing in 1899 when Congress passed the Refuse Act.

In 1970 the population of the United States was 203,184,772. The rural population of the United States was 53,884,804, or 27% of the total, while the urban population was 149,280,769, or 73% of the total.[5] The manufacturing work force of the United States was 18,492,000 (1967 Census); the total payroll of those engaged in manufacturing processes was $123,380,600,000.00.[2] Manufacturing plants employed 26% of the entire civilan work force. The gross national product exceeded $1 trillion. The population of Allegheny County was 1,605,016, of which 94.8% resided in urban areas.[5]

The Court of Appeals, recognizing the dissimilarity between the United States in 1899 and 1970, found that for PICCO to be guilty of a crime it would have been necessary to find that Congress intended to create a crime which industry could not avoid if it operated a plant on a navigable stream and discharged any waste into the stream. The cases of *U. S. v. Standard Oil Co.*, 384 U. S. 224, 86 S. Ct. 1427 (1966); *U. S. v. Republic Steel*, 362 U. S. 482, 80 S. Ct. 884, 1960); and *U. S. v. Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C. A. 3, 1967), are not precedent for the proceeding attempted against PICCO. *Republic Steel*

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[2] 1967 Census of Manufacturers, Volume I, General Summary, Table 1 (p. 26).

[3] Historical Statistics of the United States—Colonial Times to 1957, U. S. Bureau of the Census (1960) (p. 139), Series F 1-5.

[4] 1969 Pennsylvania Statistical Abstract.

[5] 1970 Census of the Population; Advance Reports.

clearly involved discharges impeding navigation. The two *Standard Oil* cases had nothing to do with a permit program because of the accidental nature of the discharges involved. Until the Presidential Proclamation of December 23, 1970, no permit program existed in the United States for industries existing along the banks of navigable waters and discharging industrial wastes into navigable streams. Throughout World War II, the United States government gave "E" awards for excellence to industries along every navigable water way in the country who were discharging industrial wastes into such waterways while creating the war arsenal to win the war. The literal interpretation of the Act of 1899 demanded by the government in 1970 would have required every industrial establishment in the United States discharging industrial wastes into a navigable stream to close its plant since no permit program existed. The Court of Appeals, recognizing the impracticality of such a finding, has read the Act of 1899 in harmony with the Water Quality Act of 1965 and 1970 to achieve an orderly transition and enable industry to come into compliance with the permit program as established. As stated by the Court of Appeals for the Third Circuit, to hold otherwise would deprive PICCO of its property without due process of law.

Until Congress acts to provide reasonable regulations and statutory authority which avoid illogical, unconstitutional results,[6] the Court of Appeals for the Third Circuit

[6] The 92nd Congress has finally passed, over Presidential veto, an act which may clear up many of the prior legislative inconsistencies

has properly interpreted the areas in which Congress has acted to avoid these results and certiorari should be denied.

Respectfully submitted,

JEROME M. LIBENSON,
HAROLD GONDELMAN,
HERBERT B. SACHS,
BASKIN, BOREMAN, WILNER, SACHS,
GONDELMAN & CRAIG,

Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit.

BRIEF FOR AMICI CURIAE UNITED STATES STEEL CORPORATION AND WHEELING-PITTSBURGH STEEL CORPORATION IN OPPOSITION TO THE GRANT OF THE PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether Defendant can be prosecuted for its failure to hold a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407), for a discharge of treated waste water with no tendency adversely to affect navigation alleged to meet applicable water quality criteria which took place in the summer of 1970 prior to the creation of a program for the issuance of permits governing such discharges.

Interest of the Amici Curiae.

2. Whether the Defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that no permit from the Corps of Engineers was necessary to discharge into the Monongahela River treated waste water with no tendency adversely to affect navigation is an adequate defense to the present prosecution.

INTEREST OF THE AMICI CURIAE

Criminal informations were filed against United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation in the United States District Court for the Western District of Pennsylvania on the same day as the criminal information involved in this matter was filed against Pennsylvania Industrial Chemical Corporation ("PICCO"). The informations involve discharges of substances with no tendency adversely to affect navigation in the summer of 1970 prior to the existence of a permit program for such discharges. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation moved to dismiss the informations filed against them. Following argument on the motions to dismiss, the District Court entered an order deferring decision of the motions to dismiss until the decision of the Third Circuit Court of Appeals in this matter. No decision has yet been entered on the motions to dismiss. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation believe the disposition of the informations filed against them is likely to be controlled by any action of this Court in the present matter. Therefore, they have obtained the consent of the Solicitor General and counsel for PICCO to file this brief as amici curiae.

ARGUMENT

There are no issues involved in this case which have sufficient importance to justify consuming the time of this Court in their resolution. The essential holding of the Court of Appeals for the Third Circuit is that it was a violation of due process to prosecute PICCO criminally for the failure to have a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407) (hereinafter "§ 13") for the discharge of treated industrial waste water with no tendency adversely to affect navigation into the navigable waters of the United States if at the time the discharges took place, there was no program pursuant to which PICCO could have obtained such a permit. Two events which have happened since the date of the discharges involved in this case have severely limited the significance of the decision of the Court of Appeals. First, on December 25, 1970, by Executive Order No. 11574, 35 Fed. Reg. 19627, the President announced the promulgation of a permit program under § 13 for discharges of the type involved in this case. Hence, with regard to discharges taking place after the implementation of the permit program on April 7, 1971, 36 Fed. Reg. 6564, 33 C.F.R. § 209.131, no one can argue that no mechanism existed for obtaining a permit pursuant to § 13. For practical purposes the *PICCO* defense cannot be raised in connection with any discharges taking place after that date. It is true, as the Government notes, that in the case of *Kalur v. Resor*, 335 F. Supp. 1 (D. D. C 1971), *appeal pending*, the issuance of permits under the new regulations was enjoined by the District Court for the District of Columbia on the ground that the regula-

tions of the Corps of Engineers fail to satisfy all requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). However, this decision when read with *PICCO* obviously does not prevent the Government from prosecuting persons who have not applied for permits, nor persons whose applications for permits have been rejected for inadequacy or because the proposed discharges are unsatisfactory. It is difficult to imagine why the Government would wish to prosecute someone who had submitted a satisfactory permit application where the only inhibition to the issuance of a permit is the injunction issued in *Kalur v. Resor, supra*. The *PICCO* decision seems to have no bearing whatsoever on accidental spills into the navigable waters of the United States. Hence, despite the protestations of the Government, the *PICCO* decision appears to have practically no effect on enforcement of § 13.

There is, however, an additional development which renders the *PICCO* decision even less significant. On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 (S 2770) ("the Amendments") became law. The Amendments have a significant effect on § 13. The permit program is continued, but responsibility for permits involving discharges with no tendency to affect navigation is transferred from the Corps of Engineers to the Environmental Protection Agency. Most important, the Amendments provide in Section 402(k) that:

> "Until December 31, 1974, in any case where a permit has been applied for pursuant to this Section [which by Section 402(a)(5) of the Amendments is deemed to include applications pending under §

> 13], but final administrative disposition of such application has not been made, such discharge shall not be a violation of . . . Section 13 of the Act of March 8, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

This provision has the effect of codifying and confirming the limitations on the effect of the *PICCO* decision which we have suggested above. As a result, we submit that *PICCO* can control only a handful of cases all involving events which took place over 18 months ago. Although the Government states at page 10 of its petition that 115 criminal cases brought since 1970 are pending, it does not state how many of those involve accidental spills to which the defense of unavailability of a permit is not very plausible or how many involve discharges after the institution of a permit program to which the *PICCO* decision would not appear to be literally applicable. With regard to civil suits, we suggest that the limitations of the savings provision of the Amendments are controlling and obviate any questions raised by *PICCO*. The savings provision in Section 4(a) of the Amendments refers only to suits under the Federal Water Pollution Control Act and does not refer to civil suits under § 13.

The Court may rightly ask if our argument as to the limited effect of the *PICCO* decision is true, why the

amici have troubled themselves with the preparation and filing of this brief. The answer is that while the issues of *PICCO* are of little significance to others in the future, they are of great significance to the amici with regard to multiple count criminal informations filed against them at the same time as those filed against PICCO and arising out of like discharges in the summer of 1970. The amici feel severly aggrieved by the act of the United States in prosecuting them for failure to possess a permit that no reasonable man would have believed was necessary and no reasonable man then or now would have believed to have been available at the time charged in the informations. The information against United States Steel Corporation is in 35 counts while that against Wheeling-Pittsburgh Steel Corporation is in 13 counts. In light of the action of the District Court for the Western District of Pennsylvania in the *PICCO* case in assessing the maximum fine of $2,500 on each count, there is ample financial incentive for the amici to pursue this matter even if principle were not involved.

The amici contend that the resolution of this matter by the Third Circuit was a sound one. Although that court rejected the contention that § 13 was limited to a prohibition of discharges with a tendency to affect navigation, it recognized that a reasonable person, relying on the official pronouncements of the Corps of Engineers dealing with § 13, could well have reached that conclusion at the time the discharges of PICCO took place. Second, the Court of Appeals recognized the incontrovertible fact, acknowledged by representatives of

the United States in their more candid moments,* that there is a fundamental inconsistency between the absolute prohibition of waste water discharges with no tendency to affect navigation now said by the Government to be contained in § 13 and the provisions of the Water Quality Act of 1965. The latter Act obviously recognizes that a certain amount of discharge is inevitable under the current state of technology and the economy and hence provides for the definition of standards of water quality and for the abatement of dis-

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* E.g., in an interview with William Ruckelshaus, Administrator of the Environmental Protection Agency, published in the May, 1971 issue of *Environmental Science and Technology* under the caption, "A Candid Conversation with the First Administrator of the Environmental Protection Agency," the following exchange took place at page 392:

[QUESTION]:

"Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?"

[ANSWER BY MR. RUCKELSHAUS]:

"The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 Act, the people are to comply with the water quality standards; it says nothing about discharge into a stream being illegal.

"It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."

charges which violate such standards. The clear implication of the Water Quality Act of 1965 is that discharges which meet or better the existing water quality standards are lawful.

The Court of Appeals recognized that the only way the alleged absolute prohibition of § 13 could be reconciled with the clearly implied permissibility of discharges which meet the water quality standards under the modern legislation was through the device of a permit program under § 13 which would authorize discharges which met applicable standards. Despite the argument of the Government at pages 14 and 15 of its brief that Congress in 1899 intended to absolutely prohibit discharges into the navigable waters of the United States, it seems impossible in light of the economy and technology at that time to believe that Congress intended anything more than to regulate the location of such discharges. The Court of Appeals rightly did not allow itself to be persuaded that in 1899 Congress prohibited all discharges into the navigable waters of the United States. In addition, the Court of Appeals examined the record which showed PICCO's offer to demonstrate clearly that the Corps of Engineers had never contemplated the possibility that it had authority to institute such a program at the time PICCO made its discharges. It examined the record which showed PICCO's offer to prove that PICCO had obtained those permits for its discharges of treated waste water which were clearly required under the Clean Streams Law of the Commonwealth of Pennsylvania and those permits from the Corps of Engineers for construction of its outfalls that were clearly required by the regulations of the

Corps. The Court of Appeals reached the eminently reasonable conclusion that assuming the existence of the facts in the offers of proof the conviction of PICCO was an "unsound result" and a denial of due process. As the Court said, "Congress did not intend criminal penalties for one who failed to comply with a non-existent regulatory program."

CONCLUSION

Both because of the relative unimportance of the *PICCO* decision and the soundness of the result reached by the Court of Appeals for the Third Circuit, this Court should decline to exercise jurisdiction and deny the petition for a writ of certiorari.

DAVID MCNEIL OLDS
JOHN MCN. CRAMER
REED SMITH SHAW & MCCLAY
Attorneys for Amici Curiae

WILLIAM FOSTER
Senior General Attorney
United States Steel Corporation

FRANCIS ST. C. O'LEARY
General Counsel
Wheeling-Pittsburgh Steel Corporation
OF COUNSEL

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the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVANIA INDUSTRIAL CHEMICAL CORPORATION

TITION FOR A WRIT OF CERTIORARI TO THE UNITED ATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EPLY MEMORANDUM FOR THE UNITED STATES

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pposition to the petition for a writ of certiorari, ndent urges that the decision of the court of ap- should be sustained since at the time the com- discharged pollutants into the Monongahela no formal permit program existed under the Act. Reference is made to an interview with m D. Ruckelshaus, Administrator of the En- ntal Protection Agency ("EPA"), reported May 1971 issue of the trade magazine, "En- ntal Science & Technology." Mr. Ruckelshaus quoted as stating that persons could not "get] if they wanted to" prior to implementation

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of the December 1970 permit program; before then "we did not have any permit program for the discharge of waste into a stream." *Id.* at 392.

As is not infrequently the case in interviews of this sort, the statement attributed to Mr. Ruckleshaus is not entirely accurate. It is true that no formal permit "program" such as the one established by Executive Order No. 11574 in December 1970 (see Pet. 6 n. 5) existed at the time of the discharges involved here. But a federal discharge permit could then have been obtained under the Refuse Act, in the discretion of the Secretary of the Army, had respondent made an application. Perhaps because issuance of such permits was not the responsibility of the EPA Administrator, but was a discretionary function assigned by statute (33 U.S.C. 407) to the Secretary of the Army, Mr. Ruckelshaus was not entirely familiar with past practice.[1] In any event, permits, though few in number, were issued by the Secretary of the Army under 33 U.S.C. 407 between 1963 and 1969.[2]

The fact that the number of permits issued under the Refuse Act was far fewer than are presently contemplated under the new "program," and that they were not issued under formalized procedures, is, as

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[1] As pointed out in our petition (p. 17, n. 18), the Secretary of the Army's permit authority under the Refuse Act was transferred to the EPA Administrator by the Federal Water Pollution Control Act Amendments of 1972 (Sections 101(d) and 402).

[2] "Effects of Mercury on Man and the Environment," Hearings Before the Subcommittee on Energy, Natural Resources and the Environment of the Senate Committee on Commerce, 91st Cong., 2d Sess., Pt. 2, pp. 168 and 201 (July 29-30, 1970).

stated in our petition, insufficient basis for reading out of the Refuse Act the ban on discharging pollutants into the Nation's navigable waters. The First Circuit recently so held in *United States* v. *Granite State Packing Co.*, No. 72–1253 (November 6, 1972), in an opinion which we are appending hereto. The *Granite State* decision is contrary to the decision in the instant case and thus presents a conflict between the First and Third Circuits on an important question involving the construction of a federal criminal statute that should be resolved by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72–1253

UNITED STATES OF AMERICA, APPELLEE

v.

GRANITE STATE PACKING COMPANY,
DEFENDANT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge;* ALDRICH and CAMPBELL, *Circuit Judges.*

November 6, 1972.

ALDRICH, *Senior Judge.* Defendant, operating a slaughtering plant in the City of Manchester, New Hampshire (City), appeals from a conviction on three counts for violating section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, also known as the Refuse Act of 1899, in that it did "discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . refuse matter . . . other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water

of the United States. . . ." *United States* v. *Granite State Packing Co.*, D.N.H., 1972, 343 F.Supp. 57. In this court defendant does not dispute the district court's finding that the Merrimack River, hereinafter river, is navigable in the jurisdictional sense. *United States* v. *Appalachian Power Co.*, 1940, 311 U.S. 377, 404–10; *Rochester Gas & Elec. Corp.* v. *United States*, 2 Cir., 1965, 344 F.2d 594, or that its animal waste is not exempted sewerage; *United States* v. *Republic Steel Corp.*, 1960, 362 U.S. 482; *United States* v. *Pennsylvania Indus. Chem. Corp.*, W.D. Pa., 1971, 329 F.Supp. 1118, *rev'd on other grounds*, 3 Cir., 1972, 461 F.2d 468. It advances various defenses based upon the fact that it discharged its refuse into the sewerage system of the City.

The facts are these. Sometime prior to 1885 a railroad, laid out between defendant's plant and the river, constructed a stone culvert under its right of way to carry discharges by defendant's predecessor in occupation. In 1885 the City connected a sewer to the culvert, part way between defendant's plant and the railroad track. Since then defendant's and the City's effluents, mingled at the point of juncture, jointly pass under the track and into the river. No exercise of eminent domain, deeds, or other documents support any part of this procedure, but it would seem reasonably apparent that by this time both defendant and the City have an easement of flow as against the railroad. Whether defendant has enforceable rights against the City need not be considered. The court found, stretching the facts, perhaps, in defendant's favor, that since the culvert "is part of the municipal sanitary and storm sewer system" of the City, "defendant discharges into a public sewer." Although it might be said, instead, that the public sewer dis-

charges into defendant's culvert, we accept this finding for present purposes. The court concluded, however, that even though defendant discharged its refuse into a municipal sewer system, its contention that this freed it of liability did not follow. We agree.

There is nothing in the statute that supports defendant's position. As a matter of simple logic, if a party deposits an impermissible substance in a municipal sewer, knowing that the sewer leads directly into navigable water, it "causes, suffers, or procures" the substance to be discharged into the stream. *Cf. Nowlin* v. *United States,* 10 Cir., 1964, 328 F.2d 262. Moreover, it seems clear that the statute is not restricted to direct deposits, *United States* v. *Esso Standard Oil Co. of Puerto Rico,* 3 Cir., 1967, 375 F.2d 621, or, at least within limits, to *scienter. United States* v. *United States Steel Corp.,* N.D. Ind., 1970, 328 F.Supp. 354, 356.

Nor is defendant aided by the fact that a subsequent portion of the statute empowers the Secretary of the Army to grant exceptions from the broad prohibition. Under the authority of the Refuse Act and Executive Order No. 11574, the Secretary has established a comprehensive permit program. 33 C.F.R. § 209.131 (1971). Even if, which we need not consider, defendant could readily have obtained a permit, this would be no defense; the statute makes the receipt of a permit a condition precedent. While the regulation might be said to modify this requirement where a party "[d]ischarges or deposits into a municipal or other public sewage *treatment* system," 33 C.F.R. § 209.131(d)(2)(ii) (emphasis added), the City passes its sewage raw; there is no treatment. *United States* v. *City of Asbury Park,* D. N.J., 1972, 340 F. Supp. 555. Defendant's argument that the City is planning

to have a treatment system does not even warrant
description "specious."

Equally without merit is defendant's claim tha
on the other hand, it could not get a permit,
either contrary to the intent of Congress, or un
stitutional, to apply the statute to it. The statute
no purport to provide for permits as of right.
cally, it forbids certain conduct, with excepti
Defendant has not shown that the exceptions
arbitrary, unreasonable, or discriminatory. We
nothing more to the case.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, pp. 1a-27a) are reported at 461 F.2d 468. The memorandum opinion of the district court on respondent's motion for judgment of acquittal (Pet. App. C, pp. 29a-41a) is reported at 329 F. Supp. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 28a) was entered on May 30, 1972. A petition for rehearing was denied on August 21, 1972 (Pet. App. D, p. 42a). Pursuant to an order extending the time within which to file a petition for a writ of certiorari,

the petition was filed on October 20, 1972; it was granted on December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's alleged failure to institute a formal permit program under the Refuse Act of 1899 (33 U.S.C. 407), pertaining to industrial discharges into navigable waters of refuse not having an adverse effect on navigation, is, if proved, a bar to criminal prosecutions under that statute for such discharges.

2. Whether respondent's claim that it was affirmatively misled by the Corps of Engineers into believing that it could with impunity discharge into the Monongahela River refuse not tending adversely to affect navigation is an adequate defense to the present prosecution.

STATUTES INVOLVED

Section 13 of the Rivers and Harbors Act of 1899 (the "Refuse Act"), 30 Stat. 1152, 33 U.S.C. 407, provides in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited * * * from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any

navigable water from which the same shall float or be washed into such navigable water * * *: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 16 of the Rivers and Harbors Act of 1899, 30 Stat. 1153, 33 U.S.C. 411, provides in pertinent part:

> Every person and every corporation that shall violate * * * sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500 * * *.

STATEMENT

On April 6, 1971, the United States commenced this prosecution by the filing of a criminal information (App. 3–4), which alleged that respondent, Pennsylvania Industrial Chemical Corporation ("PICCO"), had, on four separate occasions in August 1970, discharged from its industrial plant certain refuse into the Monongahela River, in violation of 33 U.S.C. 407 and 411. Following a jury trial

in the United States District Court for the Western District of Pennsylvania, PICCO was convicted on all four counts; the maximum fine allowable by statute, $2,500.00, was imposed on each count. The court of appeals reversed and remanded the cause to the district court for further proceedings (Pet. App. A, pp. 1a–27a).

1. At trial, it was stipulated that PICCO was the owner of a manufacturing establishment on the bank of the Monongahela River, a navigable water of the United States, and that the concrete and iron pipes which deposited into that river the alleged refuse matter involved here were also owned by PICCO (Pet. App. C, p. 30a). The iron pipe served only PICCO's plant; the concrete pipe served the plant and several private residences nearby (*ibid.*).

On the basis of tested samples taken from the discharges at both pipes, the criminal information charged (App. 3–4) that the effluent being deposited therefrom into the river included "iron, aluminum, and compounds containing these chemicals [and others] * * *, and solids * * *." The trial exhibits (Gov't Exs. 7–12, App. 240–242) and testimony (App. 61–76, 86–111) revealed that each of the four discharges involved contained considerably more suspended, volatile, fixed and total solids and aluminum than were found midstream in the Monongahela River. In addition, when compared with the midstream waters (Gov't Exs. 8 and 10, App. 240 and 241), two of the discharges had a significantly larger amount of sulphate (see Gov't Exs. 9 and 12, App. 241 and 242), and one of these two (Gov't Exs. 12, App 242) contained far more chloride

(as did a third deposit, Gov't Ex. 10, App. 241), and phosphate.[1]

PICCO took the position at trial that these sampled effluents did not constitute "refuse matter" within the meaning of the Act. That term, it argued, applied only to deposits that would "impede navigation," and did not cover liquid solutions such as flowed through its pipes. It also urged that the discharge from its plant was, in any event, nothing more than "sewage," which was not reached by the statutory proscription (Pet. App. A, pp. 4a–5a).[2] These contentions were rejected by the district court. It held (1) that the statutory prohibition against the discharge of refuse into navigable rivers did not depend on a resulting hindrance to navigation (Pet. App. C, p. 31a), and (2) that, since "each of the effluents was 'industrial waste,'" it was "not 'sewage,'" excepted from the Act's coverage (*id.* at 32a). These rulings were affirmed by the court of appeals (Pet. App. A, pp. 4a–6a).[3]

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[1] Comparison of Gov't Exs. 7, 9, 11 and 12 (App. 240, 241 and 242) with Gov't Exs. 8 and 10 (App. 240 and 241) also shows that three of the four discharges were considerably more alkaline and the fourth discharge more acidic than the midstream waters.

[2] The Refuse Act excepts from its coverage "* * * refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States * * *" (33 U.S.C. 407).

[3] Both courts below also rejected PICCO's contention that the term "refuse" in the 1899 Act should be defined in light of the water quality standards established pursuant to Section 10 (c)(1) of the Water Pollution Control Act of 1948, as amended (33 U.S.C. 1160(c)(1)). "Such a course of action would be unjustified," the court of appeals held (Pet. App. A, p. 8a),

2. The Refuse Act provides that the Secretary of the Army "may permit the deposit of [otherwise prohibited] material * * * in navigable waters * * * provided application is made to him prior to depositing such material * * *" (33 U.S.C. 407). It is undisputed that PICCO made no effort prior to the commencement of this action to obtain such permission with respect to the contested discharges into the Monongahela River (Pet. App. C, p. 30a).[4] The company offered at trial to show, by reference to certain regulations and internal memoranda of the Corps of Engineers, that the federal government never had a formal program for issuing discharge permits under the Refuse Act before December 1970 (App. 166–172).[5] It further offered to show, on the basis of the Corps of Engineers' alleged enforcement policy under the Act and on the basis of a 1949 conversation between officials of the Corps of Engineers and PICCO purportedly concerning a possible permit application, that it had been affirmatively misled into not applying for a

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"[i]n view of * * * significant differences [between the two statutes] in approach, and the 'cardinal rule that repeals [of legislation] by implication are not favored' * * *."

[4] The district court disallowed PICCO's offer of proof that it had obtained a discharge permit from the Commonwealth of Pennsylvania upon demonstrating that its industrial waste satisfied state water quality standards (Pet. App. C, pp. 33a, 40a).

[5] In December 1970, the President announced the establishment of a formal Refuse Act permit program (Exec. Order 11574); regulations implementing that program became effective April 7, 1971 (38 C.F.R. 209.131). That program recently became part of a new permit program authorized by Section 402 of the Federal Water Pollution Control Act Amendments of 1972, Pub. Law No. 92-500, 86 Stat. 880 (October 18, 1972).

federal discharge permit under the statute (App. 166–172, 175–177). These offers of proof were disallowed by the district court on the ground that they were not relevant to the issue of guilt under the Act (Pet. App. C, p. 35a). PICCO was convicted on all counts.

3. The court of appeals reversed (Pet. App. A, pp. 1a–27a). It rejected the district court's construction of the the Refuse Act prohibition against discharges as operating regardless of the absence of formalized permit procedures. Such a general proscription on the depositing of any "foreign substance" into the navigable waters of this country would, in the court's view, have had a "drastic impact * * * on the nation's economy even in 1899" (Pet. App. A, p. 10a). Instead, it held, Congress intended to condition enforcement of the Act on the creation and operation of an administrative permit program. The court stated (*id.* at 15a):

> Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a non-existent regulatory program.

Support for this position was apparently found in "Congress' subsequent enactments in the water quality field" (*id.* at 10a). The court stated (*ibid.*) that "[t]here would appear to be something fundamentally inconsistent between the program of developing and

enforcing water quality standards under the Water Quality Act [of 1965] and section [13] of the Rivers and Harbors Act [of 1899], if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13" (*ibid.*).

As an alternative basis for reversal, a majority of the court held that the district court had erred in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a federal discharge permit. Establishment of that proposition, it held (Pet. App. A, pp. 24a–25a), would be a due process defense to the prosecution.*

Accordingly, the case was remanded to the district court to give PICCO an opportunity "to prove the non-existence of a permit program at the time of the alleged offenses," or "to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (Pet. App. A, p. 25).

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* On this point, one judge dissented. He observed that *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, and *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621 (C.A. 3), had settled the question of the applicability of the Refuse Act to industrial discharges such as those involved here well before PICCO's alleged violations occurred. "While I agree," he stated (Pet. App. A, pp. 26a–27a), "that [due process] may require a court to recognize the defense suggested by [the majority] * * *, I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judiciray branch of the government has clearly declared the contrary."

SUMMARY OF ARGUMENT

I

The Refuse Act of 1899 forbids discharging or depositing into the navigable waters of the United States "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *" (33 U.S.C. 407). This Court and other federal courts have read the prohibition broadly in order to achieve its fundamental purpose to protect the rivers of this country against refuse that could impede or injure navigation or pollute the free-flowing waters.

In the present case, the court below, although finding that the discharge by PICCO of its industrial waste into the Monongahela River came within the general prohibition of the statute, declined to enforce the operative provision of the Act. Because, in its view, the establishment of a formal regulatory program was required by the statutory proviso giving the Secretary of the Army discretionary authority (upon receipt of a prior application) to permit certain discharges, it held that no crime could be committed in the absence of a permit program.

This novel construction of the proviso would effectively nullify the Act's broad prohibition of pollutant discharges. Neither the language of the statute nor its legislative history supports such a result. Indeed, the decision below stands the Act on its head. What Congress generally proscribed—*i.e.*, the discharge of industrial pollutants into navigable waters—becomes generally permissible. And the limited defense to a

prosecution for discharges which Congress said the Secretary in his discretion "may permit" has been expanded by the court of appeals into virtually an absolute defense in the absence of a formal regulatory permit program which Congress did not specifically contemplate or prescribe.

The fact that later enactments by Congress have called upon the States to establish water quality standards with respect to interstate waters provides no basis for eliminating the broad prohibition in the Refuse Act. The subsequent legislation in this area explicitly states that nothing therein is to be construed as affecting or impairing the 1899 ban on discharging refuse matter. In the more recent statutes Congress has, moreover, instructed the Secretary of the Army, in exercising his discretion under the earlier law, not to grant any permit for discharges that fail to satisfy the new water quality standards.

For more than 70 years the Refuse Act has been enforced by the federal courts notwithstanding the nonexistence of a formal regulatory permit program. During that period the Secretary of the Army has from time to time issued Refuse Act permits. Moreover, in recent years, administrative enforcement of the broad prohibition in the 1899 statute against discharging industrial waste into our Nation's waterways has demonstrated a special concern for control of water pollution. There is, accordingly, no warrant for eliminating the prohibition of pollution provided

by Congress in the Refuse Act merely because the Secretary, prior to December 1970, exercised his "permit" authority informally upon submission of a discharge application rather than operating under a formal regulatory program.

II

While PICCO claims that it was affirmatively misled by the Corps of Engineers into believing that no permit was necessary to discharge its industrial waste into the Monongahela River, we do not believe the company can avail itself of that defense. The regulations on which it relies to support its due process claim are outdated and do not reflect the Corps' understanding of the Refuse Act prohibition after 1968. The more recent regulations of the Corps of Engineers demonstrate its concern with matters of pollution and clearly indicate that environmental factors play an important role in processing applications for permission to use navigable waters. In view of the Corps' unmistakable resolve since 1968 to protect our Nation's waterways against the discharge of pollutants, and the clear pronouncements by this Court and other federal courts that the unauthorized depositing of industrial waste into the rivers and harbors of this country are prohibited by the Refuse Act, PICCO is in no position to justify its conduct on the ground that it was affirmatively misled to believe that its conduct here was not a crime.

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ARGUMENT

I

THE DEPOSITING OF INDUSTRIAL WASTE INTO NAVIGABLE WATERS WITHOUT FIRST APPLYING FOR, AND OBTAINING, A DISCHARGE PERMIT FROM THE SECRETARY OF THE ARMY IS A VIOLATION OF THE REFUSE ACT

The discharge of industrial waste into the navigable waters of this country is, regrettably, a practice which too many have engaged in for much too long. Only in recent years has there emerged a national awareness of the very real threat that industrial pollution poses to the survival of our rivers and harbors and to the health and welfare of those who come into contact with polluted waters. Perhaps because many of the ecological problems that are now the focus of intense concern evolved gradually, the enforcement of existing, and development of new, legislative measures to combat water pollution has heretofore been pressed with less diligence than might have been the case had the potential danger been fully appreciated earlier.

A major effort by the federal government to clean up the Nation's waterways began in earnest only a few years ago. At the time, the only statutory weapons available to the government for use against those largely responsible for creating the present conditions were the previously little-used Refuse Act of 1899 (Section 13 of the Rivers and Harbors Act, 33 U.S.C. 407) and the much-amended Federal Water Pollution Control Act of 1948 ("FWPCA").[7]

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[7] C. 758, 62 Stat. 1155, as amended, Act of July 17, 1952 c. 927, 66 Stat. 755; Federal Water Pollution Control Act Amend-

The latter statute, at least prior to its most recent amendments,[8] proved to be an "inadequate response to the increasing problems of water pollution."[9] One of the difficulties resulted from the fact that the water quality standards provided for in the 1965 amendments to the FWPCA relate only to the quality of "interstate" waters, leaving the matter of pollution control with respect to navigable waters within each State

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ments of 1956, c. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224. 84 Stat. 91, 33 U.S.C. (1970 ed.) 1151-1175.

In 1972, the FWPCA was amended for the seventh time. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. This new legislation provides both for national water quality standards (Secs. 306 and 307, 86 Stat 854 and 858) and for a federal permit program relating to the discharge of pollutants into navigable waters (Secs. 401 and 402, 86 Stat. 877 and 880); it is to be administered by the Environmental Protection Agency (Sec. 101, 86 Stat. 816). Moreover, Section 402(k), 86 Stat. 883, provides for a hiatus on new litigation under the Refuse Act of 1899 until December 31, 1974, or, if sooner, until final administrative action has been taken on permit applications submitted under the 1972 statute.

The 1972 Amendments do not, however, affect the present litigation. They explicitly provide that pending actions under the 1899 Act "shall [not] abate by reason of the taking effect of the amendment made by section 2 of this Act" (Sec. 4(a), 86 Stat. 896). Unless otherwise indicated, the discussion of the FWPCA in this brief will relate to the statute prior to its amendment in 1972.

[8] See note 1, *supra*.

[9] Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103, 1104 (1970).

essentially to local authorities.[10] A more fundamental weakness of the FWPCA until the 1972 amendments was in its enforcement procedures and the inherent time delays.[11] As explained by one commentator: "The act provide[d] for a complicated series of hearings and conferences; there [was] a minimum delay of 6 months before a hearing board [could] issue an abatement order, and the order [could] not compel actual abatement until an additional 6 months [had] elapsed."[12] Only after this extended period could the Attorney General of the United States seek judicial enforcement of the abatement order. Even then, the Act until 1972 provided no criminal or civil penalty for the previous discharge of noxious effluents (except oil spills), and thus it "fail[ed]

[10] 1965 Act, Sec. 5(a), adding Sec. 10(c)(5) to the FWPCA, 33 U.S.C. (1964 ed., Supp. IV) 466g(c)(5). If the discharges and the persons affected are in the same State, the consent of the governor of that State is required before a federal action can be commenced. 33 U.S.C. (1964 ed., Supp. IV) 466(g)(2). See also 33 U.S.C. (1970 ed.) 1160(g)(2).

[11] The problems in this regard are largely remedied by the 1972 amendments which provide for the immediate institution of a civil action in the federal courts for any violation of the statute (Sec. 309(b), 86 Stat. 860), and for the issuance by the Administrator of the EPA (see n. 29, *infra*) of compliance orders to any violator if a State has failed within 30 days of notice of the violation to institute enforcement proceedings (Sec. 309(a), 86 Stat. 859). The 1972 amendments also provide that those who "willfully or negligently" violate the operative provisions of the statute may be criminally prosecuted (Sec. 309(c), 86 Stat. 860).

[12] Steffin, *The Refuse Act of 1899: New Tasks For An Old Law*, 22 Hastings L.J. 782, 785 (1971). An alternative procedure allowed the Attorney General to institute a civil suit under the FWPCA if a violator failed to comply with water quality standards within 180 days of notice of the violation. 33 U.S.C. (1964 ed., Supp. IV) 466g(c)(5); 33 U.S.C. (1970 ed.) 1160(c)(5).

to make most acts of pollution sufficiently costly to the polluter to affect his initial decision whether to engage in conduct which causes pollution." Barry, *supra*, 68 Mich. L. Rev. at 1121.

For these reasons, the government turned to the Refuse Act of 1899, 33 U.S.C. 407, as the only effective legislative bulwark for sustaining against industrial assault the underlying philosophy that this Court had earlier said sustains a broad reading of that statute: "'A river is more than an amenity, it is a treasure.'" *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491, quoting Mr. Justice Holmes in *New Jersey* v. *New York*, 283 U.S. 336, 342.

A. THE REFUSE ACT PROHIBITION

1. Section 13 of the Rivers and Harbors Act of 1899 declares, in simple absolutes that have been characterized as "almost an insult to the sophisticated wastes of modern technology,"[13] that "[i]t shall not be lawful" to deposit or discharge into the navigable waters of the United States "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *." 33 U.S.C. 407. This provision is a codification and consolidation of earlier criminal statutes which were designed to prohibit the willful or negligent discharge into navigable waters of matter that would obstruct navigation or cause pollution. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226–230.

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[13] Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 766 (1971).

From the outset, the Refuse Act has been read by the federal courts, in accordance with its plain language, as imposing a flat ban on the dumping of foreign substances into the Nation's free-flowing rivers (see, *e.g.*, *Scow No. 36*, 144 Fed. 932 (C.A. 1)), and the statutory term "refuse matter" has consistently been accorded a broad construction. Thus, the courts of appeals quite early declined to limit the criminal sanction to discharges of "such refuse matter only as would impede or obstruct navigation." *LaMerced*, 84 F. 2d 444 (C.A. 9); *The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (C.A. 2); *Maier* v. *Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa.), affirmed, 154 F. 2d 1020 (C.A. 3). And in the *Standard Oil* case, *supra*, this Court, eschewing "a narrow, cramped reading" (384 U.S. at 226) of the prohibition, which would have restricted it to "substances lacking a pre-discharge value" (384 U.S. at 228), held that "[t]he word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse" (384 U.S. at 230). And see *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3).

Moreover, the exception in Section 13 for refuse flowing from "sewers" in a "liquid state"—which provides the lone exclusion from the discharge proscription—was, as pointed out by the court below (Pet. App. A, pp. 5a–6a), intended to have limited application. As this Court held in *United States* v. *Republic Steel Corp.*, *supra*, it excepts from criminal

punishment only the dumping into navigable waters of "sewage" (362 U.S. at 490), as that term is customarily used, and does not exempt deposits of "industrial waste" (362 U.S. at 490–491) of the sort involved in the present case.[14]

2. Armed with this broad judicial interpretation of the prohibition in the Refuse Act, recognized by this Court as essential "in light of the purpose to be served" (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491), the United States launched a major enforcement program against industrial polluters in the federal courts in the latter months of 1969 and early 1970, seeking both criminal sanctions and civil injunctive relief under the statute.[15] The program has, thus far, been quite effective. Unrestrained use of our Nation's waterways as a dump-

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[14] The district court instructed the jury that the term "sewage" was defined "as, generally, that water, filth, and feculent matter deriving usually from human and domestic waste, but not including industrial waste" (Pet. App. C, 32a) The jury found that the discharged matter flowing from respondent's pipes was "industrial waste" (*ibid.*). As was the case in *Republic Steel Corp.*, the waste material here contained articles in suspension, although in lesser amounts; but this Court has clearly stated that the existence of such particles in suspension does not permit industrial discharges to be "treated as favorably as sewage is treated" (362 U.S. at 491). The court below found that to be the controlling principle here (Pet. App. A, p. 6a).

[15] In *Republic Steel Corp.*, *supra*, this Court upheld the district court order enjoining further discharges of industrial waste without a permit from the Secretary of the Army, finding the discharges to be in violation of Sections 10 and 13 of the Rivers and Harbors Act (362 U.S. at 485). The federal courts have since uniformly upheld Refuse Act suits by the federal government to enjoin pollution. See Sandler, *The Refuse Act of 1899: Key to Clean Water*, 58 A.B.A.J. 468–469 (1972).

ing ground for industrial waste matter has repeatedly been condemned by the courts as contrary to the spirit and letter of the 1899 Act, and, for the first time, there is evidence of a noticeable reduction in the flood of pollutants being discharged into our rivers, lakes and harbors. See, *e.g.*, *United States* v. *Granite State Packing Company*, C.A. 1, No. 72–1253, decided November 6, 1972 (animal waste); *United States* v. *Genoa Cooperative Creamery Co.*, 336 F. Supp. 539 (W. D. Wisc.), appeal docketed, C.A. 7 (creamery wastes); *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.) (steel-mill waste); *United States* v. *Hercules, Inc.*, 335 F. Supp. 102 (D. Kan.) (ammonia); *United States* v. *Armco Steel Corp.*, 333 F. Supp. 1073 (S.D. Tex.) (cyanide, phenols and ammonia); *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me.) (blood and chicken remains); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind.), appeal pending, C.A. 7, No. 72–1590 (red sediment and oil); *United States* v. *Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla.) (heated water); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill.) (suspended solids).[16]

The contentions of those accused of pollution, seeking to narrow the scope of the Refuse Act prohibition, or, alternatively, to expand the statutory exception

[16] Of the 403 criminal prosecutions that have been decided, 327 (81 percent) have been successful. There are 115 criminal cases still pending. Fifty-three (92 percent) of the 58 completed civil suits have been decided in the government's favor, resulting in decrees requiring the immediate or phased abatement of the discharge. Seventy civil cases are still pending.

for "sewage," have generally been unsuccessful."[17] Similarly, the courts have rejected the contention that the flat ban in the 1899 Act against discharging refuse matter can no longer be enforced in light of the congressional command to establish water quality standards in the subsequently amended FWPCA."[18]

The principal weakness in the latter argument is that Congress specifically provided in the 1965 and 1970 legislation that the new statutes are not to be construed as "affecting or impairing" the prohibition in the Refuse Act."[19] See *United States* v. *Interlake Steel Corp., supra,* 297 F. Supp. at 917; *United States* v. *Maplewood Poultry Company, supra,* 327 F. Supp. at 688. This savings clause is entirely consistent with the announced purpose of the FWPCA "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution" (33 U.S.C. (1970 ed.) 1151(a)).

As this Court emphasized in *Republic Steel Corp.* and *Standard Oil,* that, too, is an objective of the Re-

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[17] As stated *supra*, p. 5, these contentions were also rejected by the court of appeals in the present case. See also *United States* v. *City of Asbury Park*, 3 E.R.C. 1417 (D. N.J).

[18] The provisions with respect to water quality standards were first added in the Water Quality Act of 1965, 33 U.S.C. (1964 ed, Supp. IV) 466g; they were retained, with some revisions, when the FWPCA was again amended in 1970 by the Water Quality Improvement Act, 33 U.S.C. (1970 ed.) 1160(c)(1).

[19] See Section 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113; 33 U.S.C. (1970 ed.) 1174.

fuse Act; it was, in the words of the court below (Pet. App. A, p. 8a), "designed to accomplish what may be viewed as the same end by different means." Congress has plainly made the considered judgment that, to clear up the Nation's waterways, it is not enough to require, as it did by the 1965 and 1970 amendments to the FWPCA, that the separate States establish "water quality criteria" for their "interstate" waters (33 U.S.C. (1970 ed.) 1160(c)(1)) which are subject to civil enforcement measures only (33 U.S.C. (1970 ed.) 1160). Such a program provides only a partial response to the ecology problem (and see pp. 13–14, *supra*). For example, as one commentator has astutely observed (Steffin, *supra*, 22 Hastings L.J. at 785; footnotes omitted):

> The only standards provided for are ambient standards which set maximum pollutant concentrations in receiving bodies of water. Consequently, there are no restrictions on the pollutants released in the individual polluter's effluent stream. This omission permits multiple polluters to continue discharging effluents while the cumulative effect of their discharges reduces the quality of the receiving body of water below the standards set by the act.[20]

Accordingly, Congress also saved unimpaired the broad prohibition in the Refuse Act (33 U.S.C. 1174), thereby preserving a complementary enforcement procedure of

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[20] The comprehensive Water Pollution Control Act Amendments of 1972 (*supra*, n. 7) effectively eliminate this deficiency of the earlier statutes by providing for quality standards for industrial and municipal effluents (Secs. 306 and 307, 86 Stat. 854 and 858), and by establishing a comprehensive permit program (Secs. 401 and 402, 86 Stat. 877 and 880).

greater impact (criminal and civil penalties) and wider application (all navigable waters).[21]

3. This legislative judgment notwithstanding, in the present case a federal court has—for the first time in more than 70 years—held, in essence, that the 1899 statute is unenforceable against anyone who discharged pollutants prior to December 31, 1970 (see n. 5, *supra*). Relying on the proviso clause giving the Secretary of the Army broad discretion to permit certain discharges if they do not impede navigation, the court below adopted a novel construction of the Refuse Act which would cast serious doubt on all prior convictions thereunder and foreclose continued prosecution of the cases now pending.[22] It is our submission that this decision rests on precisely the sort of "narrow, cramped reading" of the statute which this Court has insisted the legislative purpose "forbids" (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491; *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 226).

B. THE SECRETARY'S PERMIT AUTHORITY

1. The court of appeals based its departure here from all previous judicial interpretations of Section

[21] For a more complete discussion of the shortcomings of the FWPCA, prior to its most recent amendment in 1972, and an analysis of the interrelationship between that Act and the Refuse Act, see Note, *The Refuse Act: Its Role Within the Scheme of the Federal Water Quality Legislation*, 46 N.Y.U. L. Rev. 304, 319–323 (1971).

[22] In view of the statutory permit program to be implemented under the 1972 amendments to FWPCA (Secs. 401 and 402, 86 Stat. 877 and 880), the decision below would not affect actions under the Refuse Act that might be initiated in the future. See n. 7, *supra*.

13 on the statutory language contained in the second proviso to the general prohibition, which reads in relevant part (33 U.S.C. 407): "That the Secretary of the Army * * * may permit the deposit [of refuse matter deemed not to be injurious to navigation] * * * within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material * * *." The court assumed that Congress intended by this proviso that "a regulatory program" (Pet. App. A, p. 15a), administered by the Secretary, would be established, and that the criminal penalties in the statute would apply only to "those who failed to comply with this regulatory program" (*ibid.*). In the absence of such a program, the court thus concluded—and it is agreed that the Secretary had adopted no formalized permit procedures under the Refuse Act for some 70 years (but see n. 5, *supra*)—the discharging of pollutants into navigable waters was never intended to be a crime.

The court thus engrafted upon the Act a novel interpretation under which the proviso would swallow up—and effectively nullify—the basic statutory prohibition. In so doing, it made no reference to the fact that in the proviso Congress used the words "may permit" in authorizing the Secretary to exempt particular river deposits from the prohibition of the Act. Also ignored was the condition in the proviso that the Secretary need exercise his discretion only with respect to applications "made to him prior to depositing such material."

Unquestionably the language chosen by Congress

would not *preclude* the establishment of a formal permit program, and there is much to be said for encouraging the administrative agency to follow such a course." But it is not the function of the judiciary to rewrite legislation in a manner which it might deem to be more desirable or effective." In 1899, Congress chose to place in the discretion of the Secretary of the Army, in those instances where a prior application is made, the determination whether to immunize from criminal prosecution discharges that would otherwise be unlawful. See *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 360 (N.D. Ind.), appeal pending, C.A. 7, No. 72–1590; *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.). Nothing is said in the statute about the manner in which that authority is to be exercised. The language used is permissive, not mandatory; in contrast to other portions of the Rivers and Harbors Act enacted contemporaneously, the proviso involved here does not in terms call for a formal regulatory scheme to make the broad anti-dumping provision operative."

" One of the major difficulties in combating water pollution has been in identifying the polluters and locating where the pollutants are being discharged into the water. See Barry, *supra*, 68 Mich. L. Rev. at 1121–1122. It was in part to meet this problem that a formal permit program to regulate the discharge of refuse matter was devised in December 1970 (see n. 5, *supra*).

" As we have pointed out, Congress has now enacted legislation providing for a comprehensive permit program (see nn. 7 and 20, *supra*).

" Compare Section 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. 404, which instructs the Secretary of the Army to establish harbor lines beyond which works may not be extended or deposits made "except under such regulations as may be prescribed from time to time by him." And see Section 4 of

Nor is there any support in the legislative history for the court of appeals' assumption that Congress intended so to condition enforcement of the Refuse Act. While that history contains no specific reference to the Section 13 permit proviso, it does make clear, as we earlier indicated (*supra*, p. 15), that the broad prohibition in the 1899 statute was a codification of earlier criminal statutes, including the Act of 1890 (26 Stat. 453) and the Act of 1894 (28 Stat. 363). See *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 226–229. Neither of these predecessor statutes contemplated that application of their operative provisions would turn on the existence of a "regulatory program." On the contrary, the 1890 Act provided only that its absolute ban on the discharge of enumerated substances could not be construed "to prevent" (26 Stat. 454) the Secretary of War from granting, in his discretion, a permit to deposit such material into navigable waters; the 1894 Act contained no permit authorization whatsoever.[26] And as this Court indicated in *Standard Oil Co.*, the prohibition in the Refuse Act was not intended to have a narrower reach than that of the statutes it was designed to codify with "no essential changes in the existing law" (32 Cong. Rec. 2923).

The court below thus had no warrant for rewriting

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the Rivers and Harbors Act of 1905, 33 Stat. 1147, 33 U.S.C. 419, authorizing regulations regarding the transportation and dumping of dredging material.

[26] The predecessor Acts of 1886 (24 Stat. 329) and 1888 (25 Stat. 209), pertaining only to New York Harbor, which served as models for the above Acts, were virtually identical in form and substance.

the 1899 statute to condition the enforcement of its discharge prohibition on the establishment of a formal "regulatory program." By engaging in such judicial legislation, it has in effect stood the statute on its head. What Congress intended generally to proscribe—*i.e.*, the discharge of industrial pollutants (see *United States* v. *Standard Oil Co., supra,* 384 U.S. at 229–230)—becomes generally permissible. The proviso's *limited* defense to a Refuse Act prosecution for discharges which the Secretary in his discretion "may permit," is expanded by the court of appeals into virtually an absolute defense in the absence of a regulatory program which Congress did not prescribe.[27] No longer would it be enough for the Secretary, consistent with past practice (see pp. 27–33, *infra*), to exercise his "permit" authority informally upon submission of a discharge application; he must, under the opinion below (Pet. App. A, pp. 14a–15a), devise a formal "regulatory program" as a precondition to any prosecutions for the illegal discharge of pollutants. Such a judicial reformulation of a legislative

[27] The court of appeals apparently believed that, in light of *Standard Oil*, discharges of an "accidental nature" can be prosecuted under the Act even in the absence of a formal permit program (Pet. App. A, p. 9a). It has long been recognized that the Refuse Act draws no distinction between discharges which are accidental and those which are intentional. See, *e.g.*, *Scow No. 36, supra; The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Interlake Steel Corp., supra.* Under the Third Circuit's view of the statute, however, the intentional polluters would, in the absence of a regulatory program, go free, while those who accidentally discharge refuse matter into navigable waters could be criminally prosecuted. There is no reason to believe that is the result Congress wished to achieve.

proviso—a reformulation which essentially removes from the reach of the criminal statute the very activity it was designed to prohibit—is not warranted by any recognized principle of statutory construction. See *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 236–237.[28]

There is, moreover, no cause to give the Refuse Act such a "narrow, cramped reading" (362 U.S. at 491) because of later enactments by Congress in the water quality field. Contrary to the opinion below (Pet. App. A, p. 10a), the legislative directives in the Water Quality Act of 1965 and the Water Quality Improvement Act of 1970 that each State establish clean water standards as a means of controlling industrial pollution (see pp. 19–20, *supra*) are not "fundamentally inconsistent" with the 1899 statutory ban on almost all pollutant discharges. See, *e.g.*, *United States* v. *Interlake Steel Corp.*, *supra*, 297 F. Supp. at 916–917; *United States* v. *United States Steel Corp.*, *supra*, 328 F. Supp. at 357; *United States* v. *Maplewood Poultry Co.*, *supra*, 327 F. Supp. at 688. We have

[28] Neither *Brown* v. *State*, 167 S.W. 348 (Tex. Ct. App.), nor *Mitchell* v. *Dixon*, 168 S.W. 2d 654 (Tex. Com. App.), on which the court of appeals relies, supports its reading of the statute. Those decisions hold that where a licensing statute or ordinance requires the establishment of a board to review license applications to carry on specified activity, and no such board has been established, an individual cannot be convicted for engaging in that activity without a license. By contrast, the Refuse Act, a criminal statute, designates the Secretary of the Army as the official to issue permits in his discretion; there is no requirement that a separate board of review be established; nor is the Secretary required to do more than act on permit applications that are submitted to him.

pointed out that the earlier legislation explicitly authorizes the Secretary of the Army to act on individual discharge applications submitted to him. In exercising his discretion in this area, he has been instructed by Congress not to grant any permit if the proposed discharge fails to meet the minimum quality standards under the amendments to the FWPCA (33 U.S.C. 1970 ed.) 1171(b)(1))." This limitation on the Secretary's *permit* power, however, in no way undermines the general *prohibition*. Rather, consistently with the purpose of both the Refuse Act and the FWPCA (*supra*, p. 19), Congress has prescribed stricter controls over all discharges of refuse that may, in the Secretary's discretion, be excused from the 1899 proscription, so that foreign effluents having an impermissibly high waste content will no longer be deposited into our Nation's navigable waters.

2. We do not deny that the water quality restrictions placed by Congress in 1970 on issuance of federal permits affecting navigable waters were prompted in part by the fact that the issuing authorities had in the past, like many others, given too little attention to environmental considerations. As pointed out by the court of appeals (Pet. App. A, pp. 12a–13a), until the public recently focused on the ecological crises at hand, the Corps of Engineers had exercised its responsibility in

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" Under the 1972 Act, the authority conferred on the Secretary of the Army under the Refuse Act to permit certain discharges has been rescinded (Sec. 402(a)(5)(86 Stat. 880). The Environmental Protection Agency has the responsibility under the new legislation to administer the permit program (see n. 7 and 20, *supra*).

this area "*principally* against the discharge of those materials that [were] obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395; emphasis added). This is not to say that the Corps viewed the matter of "pollution control" as outside its jurisdiction; its 1946 regulations, for example, clearly recognized that this also was an area of its responsibility under the Refuse Act (33 C.F.R. (1946 ed.) 209.50(d)). But for many years the chemical and biological content of discharged effluents was generally not regarded as particularly significant.

As a result, the Corps has, belatedly, been accused of having been in the past "but sporadically faithful in screening issuance of section 13 [Refuse Act] permits to industrial polluters." Rogers, *supra*, 119 U. Pa. L. Rev. at 768. It is true that in only a handful of cases has a Section 13 permit accompanied an authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) to discharge industrial waste.[30] And the Section 13 permit has apparently been used

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[30] Section 10 prohibits unauthorized "obstruction[s]" to navigation, which could be due to the construction of an outflow structure through which the refuse is deposited into the water, or to the shoaling effect produced by the settling out of suspended solids contained in the discharged effluent. See *United States* v. *Republic Steel Corp.*, *supra*. In a list compiled by the Corps of Engineers in 1970 of outstanding permits issued since 1899 for the discharge of industrial waste, only five Section 13 permits appear. See *Hearings before the Subcommittee on Energy, Natural Resources, and the Environment of the Senate Committee on Commerce on the Effects of Mercury on Man and the Environment*, 91st Cong., 2d Sess., pp. 137, 168, 201 (July 1970) (hereafter "*Senate Environment Hearings of 1970*"). We are advised that one of these (Camden, Alabama) was actually a Section 10 permit.

almost as sparingly in connection with authorized dumpings of dredgings and other refuse materials under Section 4 of the Rivers and Harbors Act of 1905 (33 U.S.C. 419).[31]

The fact that the Corps of Engineers did not focus on matters of pollution as much as on effects to navigation is perhaps due in part to some confusion over the reach of the 1899 statute prior to this Court's decisions in *Republic Steel* and *Standard Oil*.[32] Whatever the explanation, it is clear that the agency began to assume a very different attitude with respect to the significance of environmental considerations shortly thereafter. As the Assistant General Counsel of the Corps testified in the *Senate Environment Hearings of 1970* (p. 26), special attention to the control of industrial pollution became evident, "as a matter of evolution, from 1966 on * * *." This was first manifested in a 1967 memorandum of understanding entered into by the Secretaries of the Army and Interior with respect to implementation of the Fish and

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[31] This was reflected in the 1968 regulations, 33 C.F.R. 209.200(e)(2), which stated in relevant part:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 * * * authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. *Although the Department has exercised this authority from time to time*, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 * * *. [Emphasis added.]"

[32] Indeed, some members of this Court believed the statute should be read more narrowly. See the dissenting opinions in *Republic Steel* (362 U.S. at 493) and *Standard Oil* (384 U.S. at 230).

Wildlife Coordination Act, 16 U.S.C. (1964 ed.) 662(a), which authorized the Corps to issue dredge and fill permits under Section 10 of the Rivers and Harbors Act. Speaking to the Corps' responsibilities under both Section 10 *and Section 13*, the memorandum stated that permits were not to be issued by the Secretary of the Army unless he could "assure compliance with water quality standards established in accordance with law" (33 C.F.R. 209.120(d)(11)). In 1968, the Corps completely revised its general permit policy; with respect to the issuance of all pemits affecting navigable waters, the new regulations announced that the agency would evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest" (33 C.F.R. 209.120(d)(1)). At the same time, the regulation that had provided that the availability of discharge permits under the Refuse Act would depend "principally" on whether the materials "are obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395) was withdrawn.

To be sure, it was not until December 1970—four months after samples were taken of the discharges involved here—that a formal permit program was set up under the Refuse Act (Exec. Order 11574).[33] But we dis-

[33] Prior to the sampling of PICCO's discharges into the Monongahela River on August 7 and 19, 1970, the Corps of Engineers had announced "sweeping changes in its regulations pertaining to permits for work in navigable waterways" (U.S. Army Corps of Engineers News Release, Washington, D.C. (May 19, 1970)), and had further advised that "new permits" under Section 13 would be required "where existing permits were

agree with the court of appeals that, until the institution of those formalized procedures, the Corps of Engineers "decline[d] to undertake the responsibility imposed upon it by Congress" (Pet. App. A, p. 15a). Congress plainly did not make the Secretary of the Army "responsible for administering [a] regulatory program under Section 13 * * *" (Pet. App. A, p. 14a). Rather, as we have shown, in prohibiting all discharges of refuse matter into navigable waters except "sewage," it simply left room for the Secretary to exercise his discretion to excuse from the general prohibition any person who applied to him in advance for permission to deposit the forbidden effluents.

The fact that few persons sought such permission (App. 173, 174) does not alter the terms of the statute. Congress imposed no obligation on the Secretary to solicit applications. Most probably, if on his own, he had undertaken earlier to do so, considerably fewer polluters would have been able to flout the 1899 law. But his inactivity in this regard neither repealed, nor provided those polluters an exemption from, the general prohibition. The Refuse Act imposes upon *them* the obligation to make prior application for a permit; and it

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granted without adequate consideration of the quality of the effluent" (U.S. Army Corps of Engineers News Release, Washington, D.C. (July 30, 1970)). The latter announcement also stated that "[w]hile permits will be required for all future discharges into navigable waters and their tributaries," the principal concentration would initially be "on major sources of industrial pollution not covered by existing permits." Copies of these news releases are appended *infra*. See also Rodgers, *supra*, 119 U. Pa. L. Rev. at 811 (discussing similar news releases issued out of the Corps of Engineers' Seattle, Wash., office). We are advised that the May 1970 news release was also issued contemporaneously out of the Corps' Pittsburgh office.

condemns as criminal any discharge of refuse matter, other than "sewage", that is made without a permit.

3. The court of appeals suggests, however, that PICCO cannot be faulted for having failed to seek a federal discharge permit, since such an application would have been merely to engage in "a charade * * * for something which did not exist" (Pet. App. A, p. 16a). This reasoning rests on a misconception that seems to run throughout the opinion, *viz.*: that because there was no formal "regulatory program," Section 13 discharge permits were "unavailable" (*ibid.*). That was not the case. As acknowledged by the court below (*id.* at 14a), there was (and is) no administrative policy "to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse effect on navigation." We have pointed out that, even in the earlier years when the concern of the Corps of Engineers was "principally" directed to matters of navigation, the Secretary exercised his permit authority under the Refuse Act on several occasions (*supra*, p. 27–29). And see *United States* v. *Republic Steel Corp.*, 286 F. 2d 875, 879 (C.A. 7), on remand from 362 U.S. 482. What is even more to the point, however, is that he was clearly prepared to take such discretionary action in appropriate circumstances with respect to applications submitted to him in 1970. That was the thrust of the testimony by the Assistant General Counsel of the Corps of Engineers during the *Senate Environment Hearings* in May of that year (pp. 28–29).[34]

[34] See also the General Counsel's testimony. *Senate Environment Hearings of 1970*, pp. 430–431.

Public announcements by the Corps in May and July indicated the same thing (*supra*, n. 33). And in November 1970, before a "regulatory program" had gone into effect, the Secretary accepted and agreed to consider applications for Section 13 permits to discharge effluents containing mercury. 1 *Environment Reporter, Current Developments*, pp. 782–783 (1970).

It is thus clear that if PICCO had submitted an application to discharge refuse matter from its iron and concrete pipes protruding into the Monongahela River, the Secretary would have given its application due consideration. It should, of course, be assumed, as was pointed out on remand from this Court's decision in *United States* v. *Republic Steel Corp., supra*, 286 F.2d at 879, that the "government officials who bear the responsibility [would] not [have] act[ed] arbitrarily or capriciously * * *." "

II

PICCO'S CONDUCT CANNOT BE JUSTIFIED ON THE GROUND THAT IT HAD BEEN AFFIRMATIVELY MISLED BY THE CORPS OF ENGINEERS TO BELIEVE IT DID NOT NEED A PERMIT FOR THESE DISCHARGES

The court of appeals divided over whether PICCO's August 1970 industrial discharges at issue here could be justified on the ground that the company had been "misled by the interpretation given to the statute by the Corps of Engineers" (Pet. App. A, p. 19a). The claim is essentially that because certain published regulations of the Corps pertaining to Section 13 focused primarily on discharges that impede navigation, PICCO had been led to believe that the permit requirement under the 1899 statute did not apply to the depositing of non-impeding pollutants into the river. The regulations on which the company relies, however, are outdated, and do not reflect the Corps' understanding of the Refuse Act prohibition after 1968. In view of the post-1968 regulations issued by the Corps, and the clear pronouncements of this Court in *Republic Steel* and *Standard Oil*, PICCO cannot, we submit, avail itself of the defense that it was "affirmatively misled * * * into believing that a permit was not necessary in its situation" (Pet. App. A, p. 25a).

A. The regulatory provisions offered by PICCO to support its due process claim antedate the clear change by the Corps of Engineers in its policy with respect to water pollution control, which we have discussed *supra*, pp. 27–33. While those earlier regulations

neither were, nor purported to be, authoritative interpretations of the scope of Section 13 (compare *Ruley* v. *Ohio*, 360 U.S. 423), they do represent what the Corps then conceived as its enforcement authority under the Refuse Act. We cannot deny that in defining its responsibilities under the 1899 statute as "directed * * * principally against the discharge of those materials that are obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395), the agency for many years viewed its role narrowly. But PICCO is in no position to excuse its conduct because of these earlier pronouncements.

In 1968, the regulation quoted above, on which PICCO places principal reliance, was withdrawn. In its stead, the Corps issued a new general permit policy, announcing that "pollution" and "conservation" factors would be considered in passing on applications for permission to use navigable waters, 33 C.F.R. 209.120(d)(1).[25] This new policy had been fore-

[25] See p. 30 *supra*. While the majority below suggests that subsection 209.200(e)(2) of the new regulations can be read as limiting the Section 13 permit authority to discharges that impede navigation, such a reading takes that regulatory provision wholly out of context. The subsection cited is part of Section 209.200(e), entitled "Dumping grounds," which is concerned with the problem of transporting and dumping refuse in designated areas within navigable waters. In subsection (2), the Corps, recognizing that Section 13 permits might be sought in connection with the dumping of dredgings and other refuse matter, served notice that in such circumstances it would "act under Section 4 of the River and Harbor Act." This subsection was retained in 1971 when the Corps promulgated its regulations implementing the Refuse Act Permit Program (33 C.F.R. 209.131).

shadowed almost a year earlier in a memorandum between the Secretaries of the Army and Interior outlining their responsibilities under the Fish and Wildlife Coordination Act (16 U.S.C. (1964 ed.) 662(a)). That memorandum, which was incorporated into the Corps' regulations, stated clearly that environmental considerations, including "compliance with water quality standards," would bear directly on the determination whether to issue permits under Section 10 and Section 13 of the Rivers and Harbors Act. See 33 C.F.R. 209.120(d)(11). Similarly, in its regulations promulgated in December 1968, dealing with its permit authority under 33 U.S.C. 403 (obstructions to navigation), the Corps served notice that applicants for permits for outfall sewers from industrial plants—which is what PICCO has maintained its pipes are (*supra*, p. 5)—would be required to furnish information on the effects of the discharged effluent on the environment. 33 C.F.R. 209.130(b)(18)(iii).

Thus, the Corps' regulations clearly reveal that by 1968 it had abandoned its former policy of considering applications for permission to conduct activity in navigable waters almost entirely from the perspective of the adverse effect that might result to navigation.[36]

Moreover, in determining whether the company's

[36] The plain meaning of the changed regulations was corroborated by the Corps' public announcement in late July of 1970 that Section 13 permits were required in cases such as the present one to avoid the prohibition of the Refuse Act (see n. 33, *supra*).

discharge of its refuse matter into the Monongahela River can properly be attributed to the manner in which the Corps of Engineers construed the statute, consideration should also be given to the proposed regulations to implement the newly-announced Refuse Act Permit Program, first published for public comment in December 1970 (35 Fed. Reg. 20005). These proposed regulations explicitly stated (proposed 209.131(d)(1)):

> Except as otherwise provided in the Refuse Act * * * all discharges or deposits into navigable waters of the United States or tributaries thereof are, in the absence of an appropriate Department of the Army permit, unlawful. The fact that official objection may not have yet been raised with respect to past or continuing discharges or deposits should not be interpreted as authority to discharge or deposit in the absence of an appropriate permit * * *.

This policy was, to be sure, expressed publicly several months after the refuse matter emanating from PICCO's pipes had been sampled by two school teachers on August 7 and 19, 1970 (App. 16–41). But the company was not served with the criminal information in this case until April 6, 1971 (App. 3–4). If, as claimed, its practice of depositing industrial waste into the Monongahela River without seeking a permit had been based on the Corps of Engineers' construction of the Refuse Act, PICCO certainly should have submitted an application for permission to continue

its discharges during the first three months of 1971; however, it did not do so (App. 237)."[37]

In view of the clear pronouncements by the Corps after 1968 that its enforcement policy with respect to the navigable waters of this country included protection against pollution as well as the preservation of safe navigation, there is, we submit, no sound reason to excuse PICCO's delinquency in this regard on the ground that it had been "affirmatively misled" by the agency to believe that its activity was lawful."[38]

[37] The company was advised by letter in November 1970 that its discharges were "unlawful" and required "a permit issued by the Department of the Army under the Refuse Act, 33 U.S.C. 407" (App. 170). An officer of PICCO testified at trial on June 28, 1971, that a discharge application had "been underway since December [1970]" (App. 175), but the company's first request for a Section 13 permit was made on application forms issued in April and May 1971 (App. 232, 237). Nothing in the *proposed* regulations encouraged any delay in filing for a permit. (Compare regulations that became effective after the criminal information was filed in this case, which required that applications be filed no later than July 1, 1971 (33 C.F.R. 209.131(d)(3).) To the contrary, they specifically advised that those who continued to discharge refuse without a permit should not rely on the absence of an "official objection" in the past to "preclude the institution of legal proceedings in appropriate cases for violation of the provisions of the Refuse Act" (35 Fed. Reg. 20005).

[38] PICCO also makes reference to a statement made to its vice-president in 1949 by a member of the Corps of Engineers, which purportedly indicated that at that time no permit would be necessary if the discharges would not impede navigation (App. 176–177). This alleged statement was made, however, during a period when the agency admittedly took a much narrower view of its enforcement responsibilities. Moreover, it preceded by a number of years the decisions of this Court in *Republic Steel* and *Standard Oil*. Indeed, at that time, the industrial plant involved here was not even in operation (App. 184). Thus, the statement, if made, is of little significance to the due process question in this case.

B. This is especially so here, where, as noted by the judge who dissented below on this issue, "the judicial branch of the government has clearly declared the contrary" (Pet. App. A, pp. 26a–27a). As we have pointed out, this Court declared in *Standard Oil* (384 U.S. at 230) that "[t]he word 'refuse' [as used in the Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." Even before that, the Court held in *Republic Steel, supra*, that day-to-day discharges into navigable waters of industrial waste (which in that case did not differ significantly from the waste matter involved here) violate Section 13 in the absence of a permit from the Secretary of the Army. These rulings were followed by the court below in a previous case. See *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3).

Thus the scope of the criminal prohibition had been authoritatively settled well before PICCO made the present illegal discharges into the Monongahela River. The argument that the Refuse Act prohibited only unauthorized discharges causing an impediment to navigation had been unequivocally rejected. We submit that PICCO cannot now avoid this judicial authority by claiming it had been misled into believing the law was otherwise by an administrative enforcement policy that had clearly been abandoned several years before the offenses involved here were committed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of conviction should be reinstated.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

RAYMOND N. ZAGONE,
JAMES R. MOORE,
Attorneys.

FEBRUARY 1973.

APPENDIX

NEWS RELEASE

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For Public Release: Tuesday, May 19 1970

CORPS OF ENGINEERS REVISES PERMIT REGULATIONS

The Corps of Engineers announced today sweeping changes in its regulations pertaining to permits for work in navigable waterways. These changes, which were approved by Secretary of the Army, Stanley R. Resor, and the Chief of Engineers, Lieutenant General F. J. Clarke, require that greater emphasis be given to environmental values in evaluating permit applications.

The changes include:

A statement that "The decision * * * will be based * * * on an evaluation of the impact of the proposed work on the public interest." "Public interest" is described as including factors such as: "navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people." This change clarifies the standard against which permit applications are to be judged and re-emphasizes that the Corps is no longer concerned only with the impact which a proposed project may have on navigation.

A new policy narrowing the function of harbor lines. The new regulations make it clear that harbor lines are merely guidelines for determining, with respect to the impact on navigation interests alone, the offshore limits of construction. Persons wishing to undertake work in navigable waters shoreward of harbor lines are now required to apply to the Corps for work permits. The previous regulations allowed riparian owners to erect open pile structures or to undertake solid fill construction shoreward of established harbor lines without obtaining a permit.

A clarification of the responsibilities of the Corps of Engineers and the Department of the Interior with respect to off-coast oil drilling operations. The new regulations note that the Department of the Interior is responsible for considering the impact which such operations may have on the total environment at the time of the selection of submerged lands of the Outer Continental Shelf for inclusion in the mineral leasing program administered by the Department of the Interior but provide for consideration by the Corps of the "impact of the proposed work on navigation and national security."

Revised regulations on the issuance of public notices and the holding of public hearings on permit applications. Except in cases involving minor work where it is clear that the proposed work would have no significant impact on environmental values, notices containing information on the proposed work are to be posted in post offices or other public places and sent to a broadly defined list of affected interests. "Doubtful cases will be resolved

in favor of public notice and normal processing." Interested parties are to be given a "reasonable time," defined as not less than 30 days except in emergency cases, to express their views. Public hearings are to be held whenever there is a manifestation of public interest in a permit application or whenever requested by Federal, State, or local public authorities.

A requirement that applicants not only define the areas they want to fill, but describe the type and location of structures proposed to be erected on the fill. Previously, applicants were not required to provide information concerning subsequent use of filled tracts.

A requirement that applicants whose proposals involve outfall works must provide details on the character of the effluent, including chemical content, water temperature differentials, toxins, sewage, type and quantity of suspended solids, amount and frequency of discharge, and the like; along with the proposed method of instrumentation, and arrangements for bearing the expense of removal of solids. Before taking action on any such permit applications, the Corps' District Engineers are required to consult with regional directors of the Department of the Interior and with Federal and State agencies having water pollution abatement responsibilities.

New permit forms for implementing the regulation changes have been furnished Corps of Engineers field offices. Among other things, these forms stipulate that observance of regulations of the Federal Water Quality Administration and State water-pollution control agencies made a condition of the permit, and permittees must make every reasonable effort to carry out approved work

in a manner that will minimize any adverse impact on fish, wildlife, and natural environmental values.

A special condition in permits authorizing the filling in of navigable waters restricts permittees from erecting buildings or structures not contemplated at the time of issuance of the permit or from significantly changing the outward appearance of approved structures or the use to which the filled tract is dedicated without first obtaining a permit modification.

A special condition in permits for outfalls restrains permittees from changing the nature of their effluent without a permit modification. Such permittees are also required to maintain adequate records of the nature and frequency of discharges and to provide discharge information to the District Engineer upon request.

[News Release]

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For Immediate Release, July 30, 1970

CORPS OF ENGINEERS ANNOUNCES NEW PERMIT REQUIREMENTS

The Corps' revised requirements are in compliance requirements under the Refuse Act (33 U.S.C. 407) concerning all discharges into navigable waters. Permits will be required for all industrial discharges into navigable waters and their tributaries. New permits will be required where existing permits were granted without adequate consideration of the quality of the effluent. Permits will also be required for current discharges into navigable waters where no permits have been granted.

Applicants for new permits are now required to identify the character of the effluent and to furnish pertinent data such as chemical content, water temperature differentials, toxins, sewage, quantity of solids involved and the amount and frequency of discharge.

The Corps of Engineers today announced new permit with the Environmental Policy Act of 1969 which requires agencies to consider environmental impact in the administration of public laws, and with the Water Quality Improvement Act of 1970 which requires appli-

cants for Federal permits to file a certification from the appropriate State that the discharge "will not violate applicable water quality standards." Under the revised procedures, the effects of discharges on water quality will be considered in processing the permit.

While permits will be required for all future discharges into navigable waters and their tributaries, the Corps of Engineers will initially concentrate on major sources of industrial pollution not covered by existing permits. The Corps hopes that through widespread knowledge of its new permit requirements including State certification, it will, along with other Federal, State, and local anti-pollution activities, encourage industries to accelerate their own anti-pollution efforts.

All actions under the Refuse Act having Water Quality implications are being closely coordinated with the Federal Water Quality Administration to insure unity in the Federal Water anti-pollution program.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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Supreme Court,
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NOV 12
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-624

UNITED STATES OF AMERICA,
Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 71-1840.

BRIEF FOR RESPONDENT, PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

HERBERT B. SACHS,
HAROLD GONDELMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,
Attorneys for Respondents,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412-562-8716).

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EDWARD W. SHANNON, REPRESENTATIVE
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-624

UNITED STATES OF AMERICA,

Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT No. 71-1840.

BRIEF FOR RESPONDENT, PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

Counter-Questions Involved

1. Did the Court of Appeals correctly rule that the respondent committed no criminal violation of the Rivers and Harbors Act of 1899 if the petitioner had since 1899 and prior to the alleged offenses established no permit program for discharges of industrial waste into navigable

streams which did not affect navigation, and had affirmatively represented that no permit was required for such operations, and where the respondent had complied with state and federal water quality control standards and had obtained a state permit, which was the only available permit for its operations?

2. Where the uncontroverted evidence establishes that respondent's industrial discharge is in a liquid state and flows from sewers, has not the petitioner proved respondent's actions were within the exception to the Rivers and Harbors Act of 1899 requiring a directed verdict of acquittal?

Statutes Involved

The statutes involved are the Rivers and Harbors Act of 1899, 33 U. S. C. §§ 407, 411; Pollution Control of Navigable Waters Act of April 3, 1970, Title I, 33 U. S. C. § 1151, *et seq.* and § 1174, 84 Stat. 114; and the Act of April 3, 1970, Title II, 42 U. S. C. § 4371, 84 Stat. 114.

The Federal regulations involved are 18 C. F. R., Chapter V, part 620-10; 33 C. F. R. § 209.200 (e) (2), and 40 C. F. R. § 120.10.

Counter-Statement of the Case

The respondent (PICCO) was convicted of violating the Rivers and Harbors Act of 1899. This conviction resulted despite the fact that for over seventy years no industrial establishment in the United States could have secured a permit from the Corps of Engineers for respondent's type of discharges; despite the fact that the respondent had secured a state permit for the discharge of industrial wastes into the Monongahela River; despite the fact that the discharges alleged in the criminal information were within the

state standards for water quality control; despite the fact that the federal government itself has specifically adopted the Pennsylvania standards so that the effect is to convict respondent of discharging industrial wastes into the Monongahela River which the federal government itself agrees complies with Federal water quality control standards; and despite the fact that the Secretary of the Army, Corps of Engineers, the Environmental Protection Agency and all industrial concerns in the United States did not deem the Act applicable to the type of discharges of which respondent was convicted. The conviction resulted in part by reason of the fact that respondent's attempts to prove these matters in defense of the charges were met by objections of petitioner which were sustained by the trial court and, therefore, not submitted to the jury.

The Water Quality Control Act of 1970 was passed on April 3, 1970. The alleged violations charged in the information occurred on August 7 and 19, 1970. The Presidential Proclamation ordering the Department of the Army to promulgate a permit program under the Act of 1899 was issued December 23, 1970. The information charging the respondent with the offenses was filed on April 6, 1971. The Presidential Proclamation and the rules and regulations promulgated thereunder incorporate the Federal Water Quality Control Act into the permit implementation program. Nevertheless, the effect of the Federal Water Quality Control Act and water quality control standards were ignored by the trial court and excluded from the consideration of the jury.

The dissimilarity between the United States of 1899 and the United States of 1970 and the change from a rural to an urban society is of assistance in understanding why the President of the United States, Secretary of the Army,

Corps of Engineers, Directors of the Environmental Protection Agency, state agencies involved in water quality standards, and the industrial concerns in the United States did not believe that the Act of 1899 was meant to encompass the industrial waste discharges which complied with state standards and were within the federal standards of water quality control. When the Act of 1899 was passed, the total (1890) population of the United States was 62,947,714.[1] The rural population of the United States was 40,481,499, or 65% of the total, while the urban population was 22,106,265, or 35% of the total.[1] The manufacturing work force in the United States was 4,850,000. The total payroll of those engaged in manufacturing processes was $2,257,700,000.[2] The gross annual product for the years 1893 through 1899 was $13.5 billion in current prices.[3] The population of Allegheny County was 775,058.[4] In 1970 the population of the United States was 203,184,772. The rural population of the United States was 53,884,804, or 27% of the total, while the urban population was 149,280,769, or 73% of the total.[5] The manufacturing work force of the United States was 18,492,000 (1967 Census). The total payroll of those engaged in manufacturing processes was $123,380,600,000.00.[2] Manufacturing plants employed 26% of the entire civilian work force. The gross national product exceeded $1 trillion. The population of Allegheny County was 1,605,016, with 94.8% residing in urban areas.[5]

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[1] 1960 Census of the Population; United States Summary, Table 3 (pp. 1-4) (Exhibit 1 of this brief).

[2] 1967 Census of Manufacturers, Volume I, General Summary, Table I (p. 26) (Exhibit 2 of this brief).

[3] Historical Statistics of the United States—Colonial Times to 1957, U. S. Bureau of the Census (1960) (p. 139), Series F 1-5 (Exhibit 3 of this brief).

[4] 1969 Pennsylvania Statistical Abstract.

[5] 1970 Census of the Population; Advance Reports.

The change in population of the United States from a rural to urban industrialized society was recognized as an important factor to be considered in problems of pollution by a specific Congressional finding:

> "(1) That man has caused changes in the environment; (2) that many of these changes may effect the relationship between man and his environment; and (3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment." 42 U. S. C. § 4371, Act of April 3, 1970.

Until 1971 and the implementation of the permit program at the direction of the President, no industrial establishment in the United States could have secured a permit from the Corps of Engineers for the discharge of industrial wastes into the navigable waters of this country since no such permits were available.[6] As stated, on December 23, 1970, the President of the United States issued a proclamation requiring the implementation of a permit program under the Act of 1899.[7] Regulations were issued pursuant to the Presidential proclamation in an attempt to cordinate the myriad of federal agencies concerned with environmental protection, and complex application forms were promulgated for the first time in history by the Corps of Engineers. These applications were first available in April, 1971. The applications were required to be filed by July 1, 1971.

The respondent had secured a state permit in 1956, which permit informed respondent that it was not required to make any applications or comply with any federal regulations (Exhibit 6 of this brief). The discharges alleged to

[6] Environmental Science & Technology, Vol. 5, No. 5, May, 1971, interview with William D. Ruckelshaus, p. 392 (Exhibit 4 of this brief).

[7] 35 Federal Register 19627 (Exhibit 5 of this brief).

violate the Act of 1899 were within the permitted standards of the regulations of the Commonwealth of Pennsylvania, which standards were adopted by the federal government in 1967. 18 C. F. R., Ch. V, 620.10, now 40 C. F. R. 120.10. An officer of the respondent had inquired of the Corps of Engineers whether any other permits were necessary for the operation of its plant. Respondent was informed that no other permits were required.

On June 24, 1971, the respondent went to trial on the information charging violation of the Act of 1899 and attempted to prove the above facts in an effort to exculpate itself from the criminal liability. The above facts were offered in evidence but excluded from the consideration of the jury and such facts as were alluded to by counsel for respondent in cross examination and from the few exhibits admitted in evidence were taken from the consideration of the jury by the court in its charge. With all of the facts available for the defense taken from the consideration of the jury by the court, it was not surprising that a verdict of "guilty" resulted.

The Court of Appeals reversed the conviction and held that under the facts of this case, no crime was committed. The Court of Appeals further held that if the Act of 1899 were construed to make PICCO's activities criminal, due process considerations would require the reversal.

The foregoing places the factual issues presented by the trial in a proper historical perspective in the light of the obvious dissimilarity between the United States of 1899 and the United States of 1970. With these changes in mind, the facts of the case necessary for determination are relatively few and simple.

On April 6, 1971, the United States Attorney, by information, charged the respondent in a four-count information with violations of 33 U. S. C. §§ 407 and 441. The first and second counts of the information charge that respondent did unlawfully discharge and deposit from a concrete pipe approximately two feet in diameter certain refuse matter enumerated in said counts into the Monongahela River, a navigable water of the United States, on August 7 and August 19, 1970, respectively. The third and fourth counts charged that respondent did unlawfully discharge and deposit from an iron pipe approximately 4-6 inches in diameter effluent into a small wooden settling box from the matter then was discharged into the Monongahela River, a navigable water of the United States, on August 7 and August 19, 1970, respectively.

On June 24, 1971, the day of trial, the counts were amended by deleting certain items from counts 1, 2 and 3 (Appendix, p. 5).

The court, in its preliminary instructions and in its charge to the jury, stated that the elements that government must prove beyond a reasonable doubt are:

> "One, that the Defendant discharged and deposited from its manufacturing establishment any refuse matter of any kind or description; two, that it was discharged and deposited into any navigable water or any tributary of any navigable water from which it shall float or wash into any navigable water; and, three, that the refuse matter flowing is not from streets and sewers." (Appendix pp. 8, 9; charge of court p. 208.)

It was stipulated that the Monongahela River at the sites of the discharge from respondent's plant is a navigable water of the United States and that the concrete and iron pipes alleged to be the sources of this discharge are owned by the respondent. The government had the burden of

proving the remaining two elements, namely, that the respondent unlawfully discharged any refuse matter of any kind and that the refuse matter was not flowing from streets and sewers in a liquid state.

Without recapping the testimony of each of the witnesses in detail, it is sufficient, for the purposes of this argument, to state that the discharges from PICCO's plant which were subject to the criminal information came from pipes or sewers (Appendix, pp. 31, 32, 34, 51, 55). The discharges were in a liquid state (Appendix, pp. 87, 102, 134). These facts are established by the government witnesses and confirmed by the defense witness (Appendix p. 131).

It was also testified that the discharges in question would in no way impair navigation (Appendix, p. 135). The defense expert witness in water quality control was called to define the term "refuse", but the trial court sustained objections, instructing counsel:

> ". . . but you cannot ask him whether or not it is refuse because I am going to define refuse, and any factor that has to do with that definition you can ask him about, but not the conclusion." (Appendix 129.)

The witness further testified that in his profession industrial discharge is:

> "The same as the State and Federal government defines it, which is something that is pollutional in nature. Something that contravenes or violates standards is, in fact, industrial waste." (Appendix, p. 135.)

The witness, in answer to a question if the receptacle into which the discharge is made is important in his profession to determine if it is industrial waste, answered:

> "Yes, primarily because the State and the Federal government has established water quality standards."

Objection to the answer was made and the court instructed the jury to disregard it (Appendix, p. 133).

PICCO subpoenaed Colonel E. C. West, District Director of the Corps of Engineers, which subpoena requested that he bring with him all rules and regulations relating to the provisions of § 407 of the Act, as well as other sections. John P. Dore, an employee of the Corps of Engineers, Pittsburgh District, for thirty-one years, appeared pursuant to that subpoena and an extended offer of proof was made as to this witness and the exhibits (Appendix, pp. 162-172). These exhibits, which were identified in the offer, were sealed and forwarded to the Court of Appeals for the Third Circuit.

William D. Johnson, Jr., Vice President of PICCO, testified for the defense and produced a series of documents which were offered in evidence. In addition to the exhibits which were objected to and sealed for review purposes, this witness testified that no federal permit to discharge effluent in the water into the Monongahela River existed (Appendix, p. 175), and that in the fall of 1949, when applying for a permit to build a pier, barge landing and water intake, he had a discussion with one of the associate engineers or assistant engineers in the Corps of Engineers' office in Pittsburgh and was told PICCO did not need a federal permit for its type of discharge (Appendix, p. 177). As a result of that conversation, there was no application made for a non-existent permit (Appendix, pp. 176-177).

Summary of Argument

The criminal information does not charge respondent with failure to have a permit in violation of the Act of 1899. It charges respondent did unlawfully discharge and deposit certain refuse matter into the Monongahela River. The defense attempted to introduce evidence in the trial court that the discharges were lawful discharges for the reason that they were well within the limits proscribed by Pennsylvania regulations, which had been adopted by the Federal regulations. The defense, therefore, was that the discharges were lawful and permitted by the Federal government itself. This evidence was excluded in the trial court.

The defense further attempted to show that this criminal case was not a pollution case for the reason that whether respondent was convicted or acquitted, it would still be permitted to discharge the same matters into the Monongahela River which the government had alleged were unlawful discharges. The net effect of the conviction of the respondent in this case would be absolute zero insofar as ecology or the purification of the national rivers and navigable waters are concerned.

The Court of Appeals recognized the fundamental unfairness of the petitioner's contentions in the trial court both as to whether a crime existed at all and whether, if a crime existed, due process considerations required a reversal.

The petitioner's argument that the effect of the holding of the Court of Appeals in this case in any way interferes with the government's water pollution control program is as fallacious as its argument that respondent committed a crime. The Federal Water Quality Control Act of 1972 takes the permit program out of the Act of 1899 and is an attempt to harmonize the legislation in the field of water pollution control.

It should be observed that if industry could not operate as petitioner charges without a permit from the Corps of Engineers since 1899 and no permit was available from the Secretary of the Army, the net effect is for the industry to either shut down, with attendant economic disaster, or operate in violation of the law. The Court of Appeals held this was not the result intended by Congress. It is respectfully submitted that such a conclusion is the only conclusion to be reached under the facts of this case.

ARGUMENT

I. The Court of Appeals correctly ruled that the respondent committed no criminal violation of the Rivers and Harbors Act of 1899 if the petitioner had since 1899 and prior to the alleged offenses established no permit program for discharges of industrial waste into navigable streams which did not affect navigation, and had affirmatively represented that no permit was required for such operations, and where the respondent had complied with state and federal water quality control standards and had obtained a state permit, which was the only available permit for its operations.

The instant case is the first case since 1899 which was tried on a criminal information through to a jury verdict. It is the first criminal case reaching this Honorable Court where the discharges, not affecting navigation, were not of an accidental nature but were of a continuing nature. It is the first case where the discharges were through a water treatment facility and met applicable state and federal water quality control standards.

Since this is a criminal statute invoking criminal penalties, it must be narrowly and strictly construed. As stated

in *United States v. Wiltberger*, 18 U. S. 5, Wheat. 76 (1920), at page 95:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative and not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

It is also inherent in our system of justice that a fair and clear warning must be given to the public of the definition of the proscribed ambit of criminal activity. Mr. Justice Holmes, in *McBoyle v. United States*, 283 U. S. 25 (1931), dealing with a case where a defendant was charged with unlawfully stealing an airplane under a statute making it a federal crime to move a stolen vehicle, held:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible that line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies. . . .".

The Court of Appeals, in reversing this conviction held:

> "The test to determine whether these facts, if true, would be sufficient to make out a due process violation is set forth in the leading case of Connally v. General Construction Co., 269 U. S. 385, 391 (1926):
>
> > 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' ". *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468 at 477 (C. A. 3, 1972).

Mr. Justice Frankfurter, in a concurring opinion in *Malinski v. People of the State of New York*, 324 U. S. 401, 65 S. Ct. 781 (1945), stated:

> "The history of American freedom is, in no small measure, the history of procedure."

In *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564 (1928), Mr. Justice Brandeis, in a dissent, cautioned:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

In *United States v. Standard Oil Company*, 384 U. S. 224, 86 S. Ct. 1427 (1966), a case relied upon by petitioner, Mr. Justice Douglas stated:

> "This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum."

The Court of Appeals for the Third Circuit was guided by these cited principles when it held that under the circumstances and facts of the case *sub judice* no crime was committed by PICCO. It is also the result of the application of the above-cited principles that required the Court of Appeals to find that even if the Act of 1899 were construed to make PICCO's activities criminal, due process considerations would require a reversal of the conviction.

If we are to apply common sense, precedent and legislative history to the Act of 1899 and the specific facts proved and offered to be proved in this case, it becomes crystal clear that the Rivers and Harbors Act of 1899 did not make the discharges of which PICCO was convicted a criminal offense. The dissenting opinions in the *Standard Oil Company case, supra,* and *United States v. Republic Steel Corporation,* 362 U. S. 482, 80 S. Ct. 884 (1960) have reviewed the legislative history of the Act of 1899 in support of the proposition that the Act of 1899 was not a pollution statute. The briefs of *amicus curiae* to be filed in this case also cover this aspect of the case and need not be repeated here.[8] It is sufficient to state that the *Republic Steel case* was a civil action for an injunction and clearly involves the discharge of solids into the Little Calumet River which affect navigation. The *Standard Oil Company case* passed only on the quality of the pollutant and not on the

> ". . . quantity of proof necessary to support a conviction nor on the question as to what *scienter* requirement the Act imposes, as those questions are not before us in this restricted appeal."

The quantity of proof necessary to support the instant conviction and the issue of *scienter* were specifically raised in

[8] 33 University of Pittsburgh Law Review 483 (1972). The author, Robert L. Potter, cogently argues against use of the Act of 1899 as a pollution statute.

in this case and specific exceptions were taken to the court's charge to the jury on these issues (Appendix, p. 221).

To understand the state of mind of the officers of respondent corporation, it is necessary to review what affirmative representations have been made to the public by the government of the United States and its agencies in charge of the enforcement of the Rivers and Harbors Act of 1899. The Attorney General of the United States, when considering the purpose of a direct predecessor of the 1899 Act, stated in his opinion to the Secretary of the Army:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been made in the improvement of the river." 21 Opp. Atty. Gen. 305, 308 (1896)

It is apposite to note that no Attorney General of the United States attempted to enforce the permit provisions of the Act of 1899 under a factual situation here present contrary to the opinion expressed by the Attorney General in 1896 until this case. In fact, an Assistant Attorney General has stated:

> "Only until early last year (1970) this statute was administered in the Department of Justice strictly as a criminal statute and it was usually applied to discharges into the navigable waters of the United States which impeded navigation." Proceedings, Rivers and Harbors Act of 1899, 30 Fed. B. J. 327, 328 (1971).

It is understandable that the Corps of Engineers would take this position since this is exactly the position taken by the government in its brief before this Honorable Court in the *Republic Steel case*. The government argued:

"The problem of pollution of streams, navigable or unnavigable, has no direct bearing on the present case, which is addressed to the obstructing of navigable capacity." Page 34 of petitioner's brief in *United States v. Republic Steel Corporation, supra.*

The Corps of Engineers had issued information circulars in 1939, a copy of which was offered in evidence but not admitted. The front page of the information circular is attached to this brief as Exhibit 7. The circular was captioned "Applications for Authority to Execute Work or Erect Structures in the Navigable Waters of the United States". Although the Corps of Engineers had been subpoenaed to bring all circulars in connection with Section 13 permits of the Act of 1899, no circular dated prior to 1971 was produced indicating permits are necessary for discharges into navigable waters which did not affect navigation. (See Exhibit 9 of this brief) It was also offered in evidence but not admitted.

In 1968, the Corps of Engineers issued a new circular entitled "Permits For Work in Navigable Waters". Excerpts from this pamphlet are attached as Exhibit 8 of this brief. This circular refers to the *Republic Steel case,* but does not indicate to the public the need for a permit to discharge industrial wastes into navigable waters which do not interfere with navigation. In a publication of the Corps of Engineers dated March 18, 1968, the following statements are, *inter alia,* made:

"1. Sections 10 and 13 of the River and Harbor Act . . . is (*sic*) designed to protect navigation and the navigable capacity of Federal navigable waters and places responsibility for enforcement upon the Department of the Army.

2. The instructions and program that follow in this paragraph deal with the problem of illegal deposits in navigable waterways under the law which explicitly concerns navigation. The Corps of Engineers has a

responsibility for pollution abatement and is carrying out that responsibility under various other media.

3. The concern of the Department of the Army in industrial waste under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for moving these shoals on those industries that are causing them."

In 33 C. F. R. § 209.200 (e) (2), the Corps of Engineers of the Department of the Army revised its regulations and served notice that it would consider pollution and other conservation factors in passing on applications under sections 9 and 10 of the Rivers and Harbors Act for permits for "work in navigable waters". The sole reference to Section 407 limited the Corps' consideration to problems of navigation as follows:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U. S. C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 C. F. R. § 209.200 (e) (2)

As stated, the first circular issued by the Department of the Army, Corps of Engineers referring to permits for work and structures in, and *for discharges or deposits in navigable waters* was dated 1971. (Exhibit 9 attached to this brief).

Exhibit "G", which was admitted in evidence, was a schedule of permit fees charged by the Corps of Engineers to show that the only permits referred in the schedule were for work to be done in and affecting the navigation of the waters.

It is thus evident that any citizen of the United States reading the Act of 1899 and the publications of the Executive Branch in charge of the enforcement provisions of said Act could only come to the conclusion that a permit was not required for industrial waste discharges into navigable streams if navigation was not affected thereby. Mr. Johnson, an officer of the respondent corporation, testified that this representation was made to him by an employee of the Corps of Engineers. Respondent offered to introduce in evidence a permit dated May 2, 1952 issued by the Corps of Engineers, United States Army (Appendix, p. 166); October 13, 1955 permits to replace piling and repair existing terminal structures, issued by the Corps of Engineers of the United States Army (Appendix, p. 166); July 23, 1956, letter to District Engineer from respondent for proposal to install a river water inlet suction well and strainer (Appendix, p. 167); July 5, 1957, letter of Corps of Engineers to respondent referring to extending a fence along the left bank of the Monongahela River (Appendix, p. 167); July 2, 1964, United States Army Engineers District, Pittsburgh Corps of Engineers, letter regarding installation of barge cable anchor on respondent's property on the Monongahela River approving the same (Appendix, p. 167); July 23, 1965, public notice issued by United States Army Engineer District at Pittsburgh advertising to the public for objections to the work of respondent from the standpoint of navigation (Appendix, p. 167); July 12, 1956, Commonwealth of Pennsylvania, Department of Health application to operate an industrial waste treatment plant on the premises of respondent and advertisements in newspapers in connection

therewith as required by state law (Appendix, p. 168); permit of the Commonwealth of Pennsylvania authorizing the waste treatment facilities and discharges into the navigable waters of the Monongahela River, which permit is attached to this brief as Exhibit 6. In connection with this permit it was pointed out to the court below that the Commonwealth stated that it was subject to compliance with sixteen conditions out of seventeen and that the one condition which respondent was not required to comply with was condition "16" requiring, *inter alia*, permission to be secured from proper federal authorities.

Respondent also attempted to prove, but was not permitted to by the court below, the water quality control standards of the Commonwealth of Pennsylvania and that the Pennsylvania standards had been adopted by the United States government, 18 C. F. R., Chapter V, part 620-10; 40 C. F. R. § 120.10. Respondent could have proved that the industrial waste discharges, of which respondent was convicted, are within the allowable limits of the State water quality control standards, and thus within the allowable limits of the federal standards.[9] This evidence would have thus proved, through the witness Listanti, an expert in water pollution control and the erection of waste treatment facilties, that the alleged violations were not industrial wastes or pollutants as those terms are defined in the industry and in the legislation referring to pollution control. None of these facts could be presented to the fact-finding tribunal—the jury—although the jury was charged with the responsibility of finding as a fact that respondent was discharging "refuse" and thus violating the Act of 1899. That

[9] Respondent offered to prove that it was in the process of constructing a $300,000.00 new water treatment facility to meet the new State standards, which would have become the new federal standards, by the end of 1974 but was not permitted to do so. (Appendix, pp. 123, 124)

this issue was crucial is demonstrated by the question raised by the jury after several hours of deliberation. The court charged the jury as follows:

> "The controversy in part centers around the term 'refuse'. The definition of this term is a simple one. 'Refuse matter of any kind or description whatsoever' encompasses all foreign substances and pollutants. It includes industrial waste of any kind and particularly solids. That is, particles in suspension as opposed to particles in solution. When a matter is in solution it is completely dissolved as the salt that was put in the water dissolved. If something is in suspension, the tiny particles are still there. They are not dissolved. They may even be too small to see, but they are still there. They are not dissolved into the solution.
>
> "The excepted refuse matter—in other words, the statutes, you will recall, except certain refuse matters. The excepted matter is that which flows from streets and sewers and passes therefrom in a liquid state. This means purely and simply, sewage. Sewage is matter carried away in sewers. That is, water, filth and feculent material. Generally, sewage derives from human and domestic waste. It does not include industrial waste or discharge, especially those containing suspended solids. The mere fact that something flows in water does not make it in a liquid state. You cannot pour industrial waste into water and have it carried into a navigable stream and then contend that it is excepted because it is in a liquid state. What we are talking about is that refuse which I have just defined to you, water, filth and feculent matter which generally comes from human or domestic waste . . ." (Appendix, pp. 208, 209)

After the jury deliberated several hours, they submitted the following question to the Court:

> "Please define again refuse matter." (Appendix, p. 224)

The court then compounded the error by repeating the charge above quoted in substance. Exceptions were taken to the original charge as well as the subsequent charge. On the issue of a permit, the court charged the jury:

> "I further instruct you that the testimony to the effect that the Corps of Engineers may not have had application forms for a permit and may not have issued permits because no one applied for one prior to August, 1970, is irrelevant and not for your consideration." (Appendix, p. 214)

The court also charged the jury:

> "Another thing I must charge you on is whether or not there were forms for permits, whether of not a permit was obtainable, has nothing whatsoever to do with this case. It is contrary to law to discharge these matters, as I have defined them to you, into a navigable stream without a permit, and if the Secretary of the Army in his discretion, decided not to give anybody a permit, so be it. It is not for us to decide that kind of an issue . . .". (Appendix, p. 211)

Specific exception was taken to the reference to the exercise of the discretion by the Secretary of the Army since no evidence was produced that such discretion had been exercised or that if exercised had not been exercised in accordance with the understanding of the law that no permit was required. So much for the affirmative representations of the Secretary of the Army, Corps of Engineers to the public that no permit to discharge into navigable waters was required unless it affected navigation. To now hold that such a permit was required and failure to have a permit is a criminal offense is basically an entrapment of the respondent into violating the law.

The government, in its brief, continues to make the argument that a permit was obtainable. Only the Depart-

ment of Justice attempts to engage in this charade. The Director of the Environmental Protection Agency, William D. Ruckleshaus, in an interview in May, 1971 stated:

> "It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."[10]

The President of the United States in December, 1970, after the alleged violations of which respondent was convicted, and prior to the criminal information, issued a Presidential Proclamation ordering the implementation of a permit program under the Act of 1899. 35 Federal Register, 19627. The Presidential proclamation ordered:

> "The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 8, 1899 (hereinafter referred to as 'the Act') to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks."

It is certainly safe to assume that the busy President of the United States would not issue a proclamation ordering the implementation of a permit program under an Act if such a permit program in fact existed prior to December 23, 1970.

Petitioner, in its brief, has attempted to place before this Court matters totally *de hors* the record, such as that a list of permits issued since 1899 for discharge of industrial wastes compiled by the Corps of Engineers in 1970 indicates only five Section 13 (407) permits. Twenty per cent

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[10] Volume 5, No. 5, May, 1971, Environmental Science and Technology, page 392.

(20%) of that list is admittedly in error since one of the permits was actually a Section 10 (403) permit. It would be interesting to see, on cross examination and scrutiny in open court, whether the other four permits were actually Section 13 permits. The petitioner also, in its appendix, has indicated news releases of the Department of the Army dated May 19, 1970 and July 30, 1970 (Government brief, pp. 41 through 46). This notwithstanding that respondent's attempts to introduce the news releases of the United States Army Engineer District in Pittsburgh dated May 7, 1971 and June 16, 1971 were objected to and not allowed in evidence at the trial. These letters and news releases are attached to this brief as Exhibits 10 and 11, and proclaim that a

> "new federal regulation goes into effect July 1 which requires all industries dumping waste material into navigable waters to obtain a permit from the U. S. Army Corps of Engineers."

The same language is repeated in various forms. In a letter of May 7, 1971, the Corps of Engineers announced that 2,000 letters of advice were issued implementing the 1899 Rivers and Harbors Act.

The Corps also forwarded application forms, which were offered in evidence to show that the application forms were voluminous and required much technological information and countered the statement of the trial judge that all one had to do was write a letter to the Secretary of the Army asking for a permit. After the first permit applications were issued, revised application forms were compiled.

While the petitioner sought a conviction of respondent for an alleged criminal offense involving "pollution", nowhere in the trial of the case was pollution defined for the jury despite the fact that, as above stated, the term has a

technological meaning and has been defined by Pennsylvania and the Federal governments.

The Pennsylvania Clean Streams Act was first enacted on June 22, 1937, and defined "pollution" as follows:

> "'Pollution' shall be construed to mean noxious and deleterious substances rendering unclean the waters of the Commonwealth to the extent of being harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, or industrial purposes, or for recreation. The Sanitary Water Board shall determine when the discharge of any industrial waste, or the effluent therefrom, constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom, as far as reasonably practicable and possible, it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined." 35 P. S. § 691.1

The Federal statute on water pollution control was first enacted in 1948. The Department of Health, Education and Welfare, in May, 1965, promulgated a model pollution law containing the following definition of "pollution":

> "'Pollution' means such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life." Vol. XLII, Pennsylvania Bar Association Quarterly, Vol. 4, page 461, citing Sax, *Water Law, Planning and Policy*, 390 (1968).

Respondent's theory in the defense of this action was to show, through its expert witnesses, that pollution has a specific definition in statutes as well as in the field of ecology and environmental control and that that definition excludes those matters which are within the standards of effluent discharge; that in order to measure an industrial discharge to determine whether it is a pollutant, it is necessary to analyze the river flow and many other factors and that if the sample discharge is within the quality control standards of the state regulations as adopted by the federal regulations, such a discharge is not a pollutant or industrial waste under the definitions of statutes and regulations. This explanation, as well as a definition of "pollution", were kept from the jury and yet the court instructed the jury as to what pollutants were and the specific facts which the jury would have to find without the jury having any idea of whether there were any standards in the United States to guide them in their fact-finding mission.

Petitioner advances a theory on why the Act of 1899 and Federal Pollution Control Acts are to be treated totally separate and apart from each other. It should be apparent that if the Act of 1899 means what petitioner argues that it means, then the voluminous statutory enactments since 1948 under the Water Pollution Control Acts are meaningless and superfluous. If, since 1899, discharges into navigable streams required a permit from the Secretary of the Army, and if the Secretary of the Army could deny such a permit and thus cause such discharges to be stopped, it follows that any less than a denial of the permit is also authorized. All the Secretary of the Army had to do since 1899 was promulgate regulations under which permits to discharge industrial wastes into navigable streams would be issued. All of the water

quality control standards subject to months of legislative hearings, hundreds of pages of testimony and legislative enactments are not needed if the Act of 1899 prohibits industrial waste discharges without a permit. That Congress has engaged in years of searching for legislation to accommodate the needs of ecology with the economy of the country and the available technology[11] compels a conclusion that the acts are *in pari materia* and should be reconciled with each other to reach a fair, logical and intelligent result. Such a result can be reached by using the Federal standards of water quality control which in this case are the same as the Commonwealth of Pennsylvania standards. It might well be argued that PICCO had a permit since the State is the certifying agency in the first instance on whether the industrial discharge should be permitted into a navigable stream. In this case, PICCO had such a permit and until the federal government preempted the field of granting permits for discharges such as those here in issue, which was not done until after December 23, 1970, the state permit should exonerate respondent from criminal charges.

The rules and regulations implementing the Presidential proclamation issued by the Corps of Engineers, Department of the Army set forth administrative procedures to secure permits for discharges or deposits into navigable waters. 36 Federal Register 90, page 6564, *et seq.* This was the first regulation ever issued by the Corps of Engineers, Department of the Army concerning such discharges. Under the regulations and statutes, Congress has recognized that the primary responsibility for water quality improvement lies with the states and at the federal

[11] For example, Mr. Johnson testified that if PICCO were required to discharge 100% pure water under the present state of technology, the plant could not operate at all. (Appendix, p.188).

level with the Environmental Protection Agency. The state is the certifying agency. The state had certified PICCO as complying with water quality control standards of the State and Federal government, but the Federal government had no permit for which the state certification would be made. The state permit until April 7, 1971, was the only permit available to PICCO. That the State was considered by Congress, even with the Act of 1899 in effect, as having the primary responsibility for the abatement of water pollution is demonstrated in 42 U. S. C. § 4371, passed April 3, 1970, which provides:

> "(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatment, and control of environmental pollution, water and land resources, transportation, and economic and regional development.
>
> (2) The primary responsibility for implementing this policy rests with State and local governments."

There is no saving clause in this legislation similar to 33 U. S. C. § 1174.

If Congress, after all of its research and hearings into pollution problems, dating from 1948 through the amendments of the 1950's and 1960's and up to and including April 3, 1970, decided that the Act of 1899 prohibited all refuse discharges into navigable waters without a federal permit, Congress certainly would not have reiterated its intent to fix the primary responsibility for water control with the state and local governments. As late as April 3, 1970, Congress has in effect declared that industrial concerns such as PICCO who had a state permit had secured the permit from the agency designated by Congress as having the primary responsibility to abate water pollution.

As stated, the criminal information in this case was filed in April, 1971. At that time the permit program gave industry until July 1, 1971 to file for permits under the Act of 1899. It was, therefore, the policy of the petitioner to give industry a reasonable time to comply with the new-found application of a seventy-one year old statute. Such a reasonable period was required in all fairness, honesty and to meet requirements of due process.

For the foregoing reasons, the decision of the Court of Appeals that PICCO has committed no crime should be affirmed.

II. The uncontroverted evidence establishes that respondent's industrial discharge is in a liquid state and flows from sewers, so that petitioner has proved respondent's actions were within the exception of the Rivers and Harbors Act of 1899 requiring a directed verdict of acquittal.

Although the Court of Appeals for the Third Circuit reversed the conviction of respondent for the reasons set forth under the preceding argument, the Court rejected the following argument. If this case is to have any impact on the interpretation and parameters of the Rivers and Harbors Act of 1899, it is respectfully submitted that the matters raised below are raised for the first time in the factual context of this case, and, therefore, should be considered by your Honorable Court as a further reason for reversing the conviction of respondent.

The trial court defined the exception to the operation of the Act of 1899 in the language contained in *obiter dicta* in the *Standard Oil Company* and *Republic Steel cases, supra.* We again turn to the uncontroverted facts in this case. The information alleges that the discharges in

August, 1970 were from "a concrete pipe approximately 2 feet in diameter" (Counts One and Two) and from "an iron pipe approximately 4-6 inches in diameter" (Counts Three and Four) (Appendix, pp. 3, 4).

All of the witnesses testified that the discharges were from sewers and, as recited above, the discharges were in a liquid state. Although the word "sewage" is not used in the Act of 1899, the charge of the court was as follows:

> "The excepted matter is that which flows from streets and sewers and passes therefrom in a liquid state. This means purely ad simply, sewage. Sewage is matter carried away in sewers. That is, water, filth and feculent material. Generally, sewage derives from human and domestic waste. It does not include industrial waste or discharge, especially those containing suspended solids. The mere fact that something flows in water does not make it in a liquid state. You cannot pour industrial waste into water and have it carried into a navigable stream and then contend that it is excepted because it is in a liquid state. What we are talking about is that refuse which I have just defined to you, water, filth and feculent matter which generally comes from human or domestic waste." (Appendix, pp. 208, 209)

The court then compounded its error by defining "sewer" as:

> "A sewer means generally an underground conduit for fluid and feculent matter usually from houses and includes surface water, waste water and waste matter. The purpose of the sewer is to carry off such surface water, waste water and waste matter to another place for discharge."

Specific exception was taken to these definitions under the facts of this case (Appendix, p. 221). When the jury requested a definition of refuse matter, the court again charged on the exception and stated:

> ". . . what the statute makes an exception for, and that is that which flows from streets and sewers and passes therefrom in a liquid state. This is the excepted refuse matter. In other words, that could be refuse matter, but it is excepted. This simply means sewage. The exception is sewage. Sewage is matter carried away in sewers. That is water, filth and feculent matter. Generally, sewage derives from human and domestic wastes. That is an exception. Sewage can, in fluid state, be put into the waters. The exception does not include industrial wastes or discharge, especially those containing suspended solids."

The court also again incorrectly defined "sewer" and specific exceptions were taken to these definitions. (Appendix, pp. 225, 226).

It is obvious that Congress when using the words "streets and sewers" in the Act of 1899 meant those words to be defined as in the then existing dictionaries and technical publications. Webster's New International Dictionary of the English Language, based on the International Dictionary of 1890 and 1900, copyright dates 1909, 1913 and 1923, defined "sewer as:

> "Now, and artificial usually subterranean, conduit to carry off water and certain waste matter, as: (1) surface water due to rainfall; (2) household waste, as slops, waste water from sinks, baths, etc., and excreta consisting of urine and feces; (3) *waste water from industrial works.*" (Emphasis added)

All of Webster's dictionaries from that date to the present define sewers in the same way.

The Universal Dictionary of the English Language, edited by Robert Hunter and Charles Morris, published in New York by Collier, 1897, defines "sewer" as:

> "An underground channel for carrying off the surface water and liquid refuse matter of cities and towns.

Sewers are constructed of brick or earthenware pipe; iron pipes are used in few instances."

Texts on sewage and waste disposal were published before and in the general area of 1899. The following are excerpts from such texts on the subject:

A Discussion of the Prevailing Theories and Practices Relating to Sewage Disposal, by Wynkoop Kiersted; New York, 1894, page 7:

"Sewage is a complex mixture with water of the *various waste products of life and industry* from densely settled communities, of which the solids are properly restricted to those that are susceptible either of solution in water or of becoming speedly disintegrated while in a state of transit. . .Its chemical composition and degree of dilution varies with the character of industrial pursuits, with the amount of mineral matter naturally dissolved in a water supply, and with the volume and rate of water consumption." (Emphasis added)

Sewerage, by A. Prescott Folwell; New York, 1898, page 15:

"For a proper consideration of the various methods of disposal, it will be necessary to understand the results aimed at and the principles involved. And first we must understand what is implied by the word sewage. In the dry sewage and pneumatic systems it means human excreta and nothing else. In the water-carriage system, however, sewage may be found to contain almost every description of waste matter: feces, house-'slops', *manufacturing waste waters and acids,* drainage of stables, piggeries, and slaughter houses, waste paper and rags, and frequently 'swill', and numberless matters which should never reach the sewer. This is ordinarily called house-sewage. Into combined and storm sewers, besides rain water, not only horse droppings and vegetable refuse, but sand, clay, gravel, and other heavy matters find admission to the street inlets. These go to make what is called storm-sewage." (Emphasis added)

Sewerage and Sewage Purification, by M. N. Baker; New York, 1896, pages 7-8:

"To make the distinction between sewers and drains more complete, it may be said that sewers carry water fouled with organic wastes from the human system, from various cleansing processes common to all householders, *and also manufacturing wastes;* all drains convey rain or underground water only." (Emphasis added)

The Act of 1899, if analyzed from a grammatical standpoint, compels the conclusion that PICCO's industrial waste discharges coming from sewers is excepted from the operation of the Act. The statute makes unlawful the discharge of any refuse matter of any kind or description whatever other "than *that* flowing from streets and sewers and passing therefrom in a liquid state into any navigable waters of the United States". (Emphasis added) If PICCO's industrial waste discharges are refuse matter within the meaning of the Act of 1899, it should be obvious that the exception in the same Act which applies to refuse matter "other that *that*" refers to the same refuse matter which is prohibited from being discharged into navigable waters. The Act does not state that refuse matter is prohibited except for water, filth and feculent material derived from human and domestic waste which flows in streets and sewers. The refuse matter of any kind which may not be discharged into any navigable waters of the United States is excepted if the same refuse matter of any kind is floating from streets and sewers in a liquid state. The uncontradicted testimony is that the discharges from respondent's plant flow from sewers in a liquid state. As such, it is excepted from the terms of the criminal statute itself. To do otherwise is to by judicial definition legislate out of the Act the exception contained in the Act.

Conclusion

The Court of Appeals for the Third Circuit, reviewing all of the facts of this case, including the offers of proof and exhibits which were excluded by the rulings of the trial court, concluded that Congress could not have intended to create a crime with the attendant criminal penalties for failure to comply with a non-existent regulatory program. For this reason the Court of Appeals held that under the circumstances of this case no crime was committed. The Court of Appeals further held that even if the Act of 1899 were construed to make respondent's activities criminal, due process considerations would require a reversal of the conviction. The Court of Appeals also held that it was not unreasonable for respondent to read Section 407 as permitting the discharge of wastes not affecting navigation in the same way the Corps of Engineers and the Department of Justice circularized and represented the same criminal statute.

This prosecution and the sentencing of respondent to the maximum fine for violating a non-existent permit program runs contrary to the history and to the philosophy of American justice which is in no small measure a history of proper procedure. This prosecution is an insidious encroachment on the traditional concepts of criminal law by men of zeal who are operating without understanding. For seventy-one years industries operating in the same fashion as respondent were not advised of the tortured interpretation of a criminal statute that would bring their operation within the ambit of criminal activity.

Great doubt is cast upon the bona fides of this criminal prosecution when it is realized that it is not a "pollution" case at all. Even if the petitioner were successful in its

criminal prosecution, respondent would still be in compliance with the state and federal standards relating to the discharge of industrial wastes into the Monongahela River since the discharges of which respondent was convicted are well within the standards of the state and federal governments. Therefore, this conviction would in no way affect or control or change the operation of respondent's plant and would in no way change the content of respondent's discharges into the Monongahela River.

It is respectfully submitted that the action of the Court of Appeals for the Third Circuit in findings that under the circumstances of this case no crime was committed should be affirmed. It is further respectfully submitted that due process considerations—fundamental fairness—require that the conviction of respondent cannot stand. Since the factual issues of this case are for the first time presented to your Honorable Court, it is respectfully submitted that the Rivers and Harbors Act of 1899 does not apply to the respondent's activities and for that reason respondent should stand acquitted of all criminal charges, without further proceedings in the court below.

Respectfully submitted,

HERBERT B. SACHS,
HAROLD GONDLEMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,

Attorneys for Respondents.

1018 Frick Building,
Pittsburgh, Pa, 15219,
(412) 562-8716.

EXHIBIT 4

Permit program

How does the permit program relate to EPA's water quality program?

Well, the permit program meshes right into the administration's request for amendments to the Water Quality Act. If and when enacted, the new law specifies that both water quality and effluent standards will be enforced through the mechanism of the permit program rather than the cumbersome and time-consuming conference procedure established by the 1965 act. In fact, the conference procedure is abolished in the proposed amendments.

We still have the hearing phase spelled out in the amendments. We can still use the administrative hearing procedure when it appears beneficial to get a number of industries and municipalities together in a particular river basin for the purpose of enhancing water quality. For example, we try to ensure that all of them are on abatement schedules and are meeting their schedules.

Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?

The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 act, the people are to comply with the water quality standards, it says nothing about discharge into a stream being illegal.

It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream.

EPA has restricted its use of the 1899 act to cases where somebody was not in compliance with water quality standards and was not doing anything to achieve compliance with those standards. There are enough of those cases to keep us busy for some time.

EXHIBIT 5

EXECUTIVE ORDERS

No. 11573

December 22, 1970, 35 F.R. 19323

EXCUSING FEDERAL EMPLOYEES FROM DUTY FOR ONE-HALF DAY ON DECEMBER 24, 1970

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1. Employees of the several executive departments, independent establishments, and other governmental agencies, including the General Accounting Office and the Government Printing Office, and their field services (except those employees of the Department of State, the Department of Defense, or other agencies who in the judgment of their agency heads should be at their posts of duty for national security or other public reasons, and those employees whose absence from duty would be inconsistent with the provisions of existing law) shall be excused from duty for one-half day on Thursday, December 24, 1970, the day preceding Christmas Day. Such one-half day shall be considered a holiday within the meaning of Executive Order No. 10358 of June 9, 1952,[87] as amended, and of all statutes so far as they relate to the compensation and leave of employees of the United States.

Sec. 2. The heads of departments, agencies, and independent establishments shall, to the extent consistent with the needs of the service, adopt a liberal policy for the granting of annual leave to all employees who wish to take such leave over the holiday period.

RICHARD NIXON.

THE WHITE HOUSE,
December 21, 1970.

No. 11574

December 25, 1970, 35 F.R. 19627

ADMINISTRATION OF REFUSE ACT PERMIT PROGRAM

By virtue of the authority vested in me as President of the United States, and in furtherance of the purposes and policies of section 13 of the Act of March 3, 1899, c. 425, 30 Stat. 1152 (33 U.S.C. 407),[88] the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.),[89] the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661–666c),[90] and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347),[91] it is hereby ordered as follows:

Section 1. Refuse Act permit program. The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as "the Act") to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.

Sec. 2. Responsibilities of Federal agencies. (a) (1) The Secretary shall, after consultation with the Administrator respecting water quality matters, issue and amend, as appropriate, regulations, procedures, and instructions for receiving, processing, and evaluating applications for permits pursuant to the authority of the Act.

(2) The Secretary shall be responsible for granting, denying, conditioning, revoking, or suspending Refuse Act permits. In so doing:

(A) He shall accept findings, determinations, and interpretations which the Administrator shall make respecting applicable water quality stand-

87. 5 U.S.C.A. § 6103 note.
88. 33 U.S.C.A. § 407.
89. 33 U.S.C.A. § 1151.
90. 16 U.S.C.A. § 661 to 666c.
91. 42 U.S.C.A. § 4321 to 4347.

ards and compliance with those standards in particular circumstances, including findings, determinations, and interpretations arising from the Administrator's review of State or interstate agency water quality certifications under section 21(b) of the Federal Water Pollution Control Act (84 Stat. 108). A permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied, or where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator pertaining to applicable water quality standards and considerations.

(B) In addition, he shall consider factors, other than water quality, which are prescribed by or may be lawfully considered under the Act or other pertinent laws.

(3) The Secretary shall consult with the Secretary of the Interior, with the Secretary of Commerce, with the Administrator, and with the head of the agency exercising administration over the wildlife resources of any affected State, regarding effects on fish and wildlife which are not reflected in water quality considerations, where the discharge for which a permit is sought impounds, diverts, deepens the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made.

(4) Where appropriate for a particular permit application, the Secretary shall perform such consultations respecting environmental amenities and values, other than those specifically referred to in paragraphs (2) and (3) above, as may be required by the National Environmental Policy Act of 1969.

(b) The Attorney General shall conduct the legal proceedings necessary to enforce the Act and permits issued pursuant to it.

Sec. 2. Coordination by Council on Environmental Quality. (a) The Council on Environmental Quality shall coordinate the regulations, policies, and procedures of Federal agencies with respect to the Refuse Act permit program.

(b) The Council on Environmental Quality, after consultation with the Secretary, the Administrator, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, and the Attorney General, shall from time to time or as directed by the President advise the President respecting the implementation of the Refuse Act permit program, including recommendations regarding any measures which should be taken to improve its administration.

Sec. 4. Definitions. As used in this order, the word "Secretary" means the Secretary of the Army, and the word "Administrator" means the Administrator of the Environmental Protection Agency.

RICHARD NIXON.

THE WHITE HOUSE,
December 23, 1970.

No. 11575

January 5, 1971, 36 F.R. 37

PROVIDING FOR THE ADMINISTRATION OF THE DISASTER RELIEF ACT OF 1970

By virtue of the authority vested in me by the Disaster Relief Act of 1970,[82] hereinafter referred to as the Act, and section 301 of title 3 of the United States Code,[83] and as President of the United States, it is hereby ordered as follows:

Section 1. (a) The authorities vested in the President by section 102(1) of the Act to declare a major disaster, by section 251 of the Act to

[82] 1970 U.S.Code Cong. & Adm.News, p. 2628. [83] 3 U.S.C.A. § 301.

EXHIBIT 6

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

SANITARY WATER BOARD

HARRISBURG

INDUSTRIAL WASTES PERMIT
#1803

The Sanitary Water Board, which by virtue of the Act of April 9, 1929, P.L. 177, known as The Administrative Code of 1929, and the amendments thereto, and of the Act of June 22, 1937, P.L. 1987, as amended by the Act of May 8, 1945, P.L. 455, is empowered to exercise certain powers and perform certain duties "To preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation;****", hereby issues this permit to Pennsylvania Industrial Chemical Corporation, Clairton, Pennsylvania, its successors or assigns, approving, subject to certain conditions, the purpose works for the treatment of wastes from the permittee's petro-chemicals plant located in Jefferson Borough with discharge of the treated effluent therefrom into Monongahela River, tributary to Ohio River — as requested in an application dated May 18, 1956 and attested May 24, 1956 as described in an engineering report entitled "Report on Jefferson Plant Contaminated Water Effluent Treatment System", prepared by R. H. Neubert, a professional engineer registered in Pennsylvania; and as shown on 5 drawings bearing the general title "Pennsylvania Industrial Chemical Corporation, 120 State St., Clairton, Pa.", and the following subtitles:

And this permit is further subject to the following numbered Standard Conditions of "STANDARD CONDITIONS RELATING TO INDUSTRIAL WASTES" effective January 1, 1941 attached hereto: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 17.

This permit is issued in response to an application (No 12191-IW) filed in the Harrisburg office of the Pennsylvania Department of Health on the 27th day of June , A.D. 19 56, and in accordance with the authorization given by the Sanitary Water Board at its meeting on July 25 and 26, 1956.

SANITARY WATER BOARD

By: _____

Bureau P. Mattison, M.D.
Secretary of Health
Chairman

Attest: John W. Gittins

John W. Gittins
Secretary

Harrisburg, Pennsylvania

OCT 1 1956

FOURTEEN: If at any time the industrial waste treatment works of the permittee, or any part thereof, or the discharge of the effluent therefrom, shall have created a public nuisance, or such discharge is or may become inimical and injurious to the public health or to animal or aquatic life or to the use of the receiving body of water for domestic or industrial consumption, or for recreation, the permittee shall forthwith adopt such remedial measures as the Sanitary Water Board may advise or approve.

FIFTEEN: The improvements being effected in the waters of the Commonwealth through the progressive, sanitary clean-up of streams by the Sanitary Water Board render the effects of industrial wastes upon these waters increasingly harmful or inimical to the public interest, in consequence of which the time should be anticipated when such industrial wastes must be suitably modified prior to their discharge thereto.

Therefore, the permittee is hereby notified that when the Sanitary Water Board shall have determined that the public interests require the treatment or further treatment of the industrial wastes of the permittee, then the permittee shall, upon notice by the Board, within the time specified, submit to the Board for its approval, plans and a report providing for the degree of treatment of the permittee's industrial wastes specified by the Board and after approval thereof shall construct such works in accordance with the directions of the Board.

SIXTEEN: The permittee shall secure any necessary permission from the proper federal authority for any outfall or industrial waste treatment structure which discharges into or enters navigable waters and shall obtain from the State Water and Power Resources Board approval of any stream crossing, encroachment, or change of natural stream conditions coming within the jurisdiction of the said Board.

SEVENTEEN: Nothing herein contained shall be construed to be an intent on the part of the Sanitary Water Board to approve any act made or to be made by the permittee inconsistent with the permittee's lawful powers or with existing laws of the Commonwealth regulating industrial wastes and the practice of professional engineering, or shall be construed as approval of the structural adequacy of the approved structures; nor shall this permit be construed to permit any act otherwise forbidden by any of the laws of the Commonwealth of Pennsylvania or of the United States.

John J. Shaw M.D

John J. Shaw, M. D.
Secretary of Health
Chairman, Sanitary Water Board

EXHIBIT 7

Form No. 93a
War Department Standard
Revised December 1939

INFORMATION CIRCULAR

APPLICATIONS FOR AUTHORITY TO EXECUTE WORK OR ERECT STRUCTURES IN THE NAVIGABLE WATERS OF THE UNITED STATES

1939

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON 1940

EXHIBIT 8

PERMITS FOR WORK IN NAVIGABLE WATERS



CORPS OF ENGINEERS
DEPARTMENT OF THE ARMY
1968

INTRODUCTION

The purpose of this pamphlet is to help you in applying for authority to perform work or place structures in or across navigable waters of the United States.

Federal laws prohibit such work unless recommended by the Chief of Engineers and authorized by the Secretary of the Army before the work is begun. The authorization is ordinarily granted in the form of a permit. The permit does not give any property rights either in real estate or material, or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights, nor does it obviate the necessity of obtaining State assent to the work authorized.

The pamphlet describes briefly the organization of the Corps of Engineers, its jurisdiction, and your responsibility under the Federal laws, and the method of compliance with those laws.

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EXHIBIT 9

Permits

for Work and Structures in, and for Discharges or Deposits into Navigable Waters

1971

PRELIMINARY EDITION



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS

EXHIBIT 10

NEWS RELEASE

U.S. Army Engineer District, Pittsburgh

FOR RELEASE ON FRIDAY, 7 MAY 1971 71-31

Implementation of Refuse Act

Pittsburgh, Pa. - 7 May 1971 - Colonel E. C. West, Pittsburgh District Engineer, announced today that he has issued approximately 2,000 letters of advice implementing the 1899 Refuse Act.

The letters are directed to about 2,000 industrial and commercial concerns presently discharging industrial wastes or effluent into navigable waters or their tributaries in the Pittsburgh Engineer District.

These waters are the Allegheny River for its full length, the Monongahela River for its full length, the Ohio River from Pittsburgh, Pa. to New Martinsville, W. Va., and all tributaries to these rivers. Tributaries include all non-navigable rivers, creeks, runs and forks, however small, whose waters ultimately flow into the three navigable rivers named.

Colonel West stated that his letter forwarded application forms (ENG Forms 4345 and 4345-1) and an information and instruction pamphlet, advising addressees that applications must be filed no later than 1 July 1971.

West emphasized that any individual, industry, or Federal, State, or other entity presently discharging industrial waste or effluent into the waters described, even though not receiving a letter of advice, will still be responsible for filing an application by 1 July 1971.

Such individuals or entities not receiving letters of advice should write for application forms and instruction pamphlets to:

District Engineer
U. S. Army Engineer District, Pittsburgh
ATTN: ORPOP-S
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

END

20a

EXHIBIT 11 Sent 25 or more TV with 4 TV stations

DEPARTMENT OF THE ARMY
PITTSBURGH DISTRICT, CORPS OF ENGINEERS
FEDERAL BUILDING, 1000 LIBERTY AVENUE
PITTSBURGH, PENNSYLVANIA 15222

ORPPA 16 June 1971

Gentlemen:

May we have your station's assistance in helping clean up our environment?

President Nixon has directed all industries who are depositing any liquid or solid material into navigable waterways to obtain a federal permit from the U. S. Army Corps of Engineers. It is required that applications be made by these industries by July 1, 1971.

In an effort to reach as many industries as possible we would appreciate your station's using the inclosed PUBLIC SERVICE ANNOUNCEMENTS at frequent intervals during the next two weeks.

We appreciate your cooperation in this important matter.

Sincerely,

E C West

1 Incl
As stated

E. C. WEST
Colonel, Corps of Engineers
District Engineer

20-second spots for radio stations - Public Service Announcements

ATTENTION ALL BUSINESSMEN. A NEW FEDERAL REGULATION GOES INTO EFFECT JULY 1 WHICH REQUIRES ALL INDUSTRIES DUMPING WASTE MATERIAL INTO NAVIGABLE WATERS TO OBTAIN A PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS. IF YOUR INDUSTRY IS AFFECTED YOU SHOULD CONTACT THE CORPS OF ENGINEERS OFFICE IN PITTSBURGH IMMEDIATELY FOR DETAILS. PHONE: 412-644-6874.

WATER QUALITY IS EVERYBODY'S BUSINESS. UNDER A NEW FEDERAL REQUIREMENT INDUSTRIES DUMPING INTO WATERWAYS MUST APPLY FOR A FEDERAL PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS BEFORE JULY 1. APPLICATION FORMS MAY BE OBTAINED FROM ARMY ENGINEER OFFICES IN THE FEDERAL BUILDING IN PITTSBURGH. BE A GOOD CITIZEN AND MAKE YOUR CONTRIBUTION TO PROTECTION OF WATER QUALITY NOW. PHONE: 412-644-6874.

MR. BUSINESSMAN, WHAT IS YOUR GRADE AS A GOOD CITIZEN? ARE YOU CONTRIBUTING TO WATER POLLUTION? A NEW FEDERAL REGULATION REQUIRES THAT ANY INDUSTRY DUMPING ANY TYPE MATERIAL INTO A WATERWAY MUST APPLY FOR A FEDERAL PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS BY JULY 1. DO YOUR PART AND APPLY NOW FOR A FEDERAL PERMIT. CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

STAMP OUT WATER POLLUTION. THIS IS THE AIM OF A NEW FEDERAL PROGRAM UNDER WHICH ANY INDUSTRY DISCHARGING ANYTHING INTO A WATERWAY IS REQUIRED TO APPLY FOR A FEDERAL PERMIT FROM THE ARMY CORPS OF ENGINEERS BY JULY 1. DO YOUR PART TO HELP STAMP OUT WATER POLLUTION. IF YOUR INSTALLATION INVOLVES EFFLUENT DISCHARGES, CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

CLEAN, CLEAR WATER IS VALUED TODAY MORE THAN EVER BEFORE. IN AN EFFORT TO HELP ELIMINATE WATER POLLUTION, A NEW FEDERAL REGULATION REQUIRES INDUSTRIES TO OBTAIN AN ARMY ENGINEERS PERMIT FOR ANY MATERIAL DEPOSITED IN NAVIGABLE WATERWAYS. LET'S ALL COOPERATE IN RAISING THE STANDARDS OF OUR VALUABLE NATURAL WATERWAYS. CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

AN INTENSIVE CAMPAIGN TO CLEAN UP THE NATION'S RIVERS AND STREAMS HAS BEEN LAUNCHED BY THE FEDERAL GOVERNMENT. A NEW REGULATION REQUIRES THAT INDUSTRIES DEPOSITING ANYTHING INTO A RIVER OR STREAM OBTAIN A PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS. APPLICATIONS MUST BE MADE BY JULY 1, 1971. STRICT MONITORING OF WATER QUALITY WILL BE ENFORCED. AFFECTED INDUSTRIES SHOULD CONTACT THE ARMY CORPS OF ENGINEERS OFFICE IN PITTSBURGH NOW. PHONE: 412-644-6874.

FILE COPY

Supreme Court, U. S.
FILED
MAR 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-624

UNITED STATES OF AMERICA,
Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

MILTON A. SMITH,
1615 H Street, N. W.,
Washington, D. C. 20006,

HENRY L. PITTS,
208 South La Salle Street,
Chicago, Illinois 60604,
Counsel for the Chamber of Commerce of the United States of America.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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OCTOBER TERM, 1972.

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UNITED STATES OF AMERICA,

Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

INTEREST OF THE *AMICUS CURIAE*.*

The Chamber of Commerce of the United States is a national association of more than 3,600 state and local chambers of commerce and trade associations with an underlying membership of over five million business firms and individuals, in both metropolitan and rural areas.

* Pursuant to Supreme Court Rule 42(1), this brief is filed with the written consents of all parties, which have been lodged with the Clerk of the Court.

Direct business memberships number in excess of 44,000 with activities ranging from raw material extraction to production of finished goods, as well as many types of services.

The Government contends in this case that, notwithstanding the federal water control program developed under the Federal Water Pollution Control Act, Section 13 of the Rivers and Harbors Act of 1899 established an absolute ban on all industrial discharges that would introduce into the receiving waters any chemical, biological or other change whatever, unless a discharge permit is first obtained from the Secretary of the Army. As noted in the opening paragraph of the Argument, *infra*, this sweeping, all-encompassing interpretation of Section 13 would require the Court to find that every agricultural, industrial or other private water user discharging into the nation's waterways has been operating in violation of federal criminal law throughout the 20th century.

Many members of the Chamber have made expenditures of substantial time, technical effort, and financial resources to comply with the nationwide program for water pollution abatement and control developed during the past decade pursuant to the Federal Water Pollution Control Act. That program could be destroyed if the Government's contentions in this case were adopted. In order to present its views on questions of vital public concern of this character and magnitude, the Chamber has participated as *amicus curiae* in a number of instances in both this Court and the lower federal courts, including one of the principal cases relied upon by the Chamber in the case at bar, namely, *The Boys Markets, Inc.* v. *Retail Clerks' Union Local 770*, 398 U. S. 235 (1970).

QUESTION PRESENTED.

Does Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. § 407) provide an absolute prohibition against the discharge of all process, cooling or drainage water into navigable waters or tributaries (except that flowing from public streets and sewers), unless a discharge permit is first obtained from the Secretary of the Army?

SUMMARY OF ARGUMENT.

It is the position of *amicus*, Chamber of Commerce of the United States of America, that, for the reasons mentioned below and more fully developed in the Argument following, the discharges of all process, cooling and drainage water into the nation's waterways are regulated under the Federal Water Pollution Control Act, not Section 13 of the 1899 Act, and this construction does not impair the authority of the Secretary of the Army to maintain navigation under the latter Act.

The legislative history of Section 13, which was one section of a compilation of prior statutes adopted to protect the navigational interests of the federal government, supported by its interpretation and administration by the executive branch of the government for 70 years, shows that Section 13 was intended to be a navigation, and not a pollution control, statute.

Moreover, commencing with the adoption of the Federal Water Quality Act of 1965 and the subsequent amendments of the Federal Water Pollution Control Act, Congress

made it clear beyond doubt that discharges relating to the control and abatement of water pollution were to be regulated under those statutes, and not under the Rivers and Harbors Act of 1899. Construing the older navigation law with the later pollution law in this fashion gives the fullest possible effect to the central purposes of both, thereby avoiding the irreconcilable conflict which would result from the Government's suggested construction of the 1899 enactment. (See pages 24 through 30, *infra*.)

Of even greater portent for the future is the fact that the Government's interpretation of the 1899 law would emasculate the massive water control program now being implemented throughout the country, as mandated by Congress in the Federal Water Pollution Control Act Amendments of 1972.

Finally, if the 1899 law and the later control law are not construed together in the foregoing manner, they are so vague, arbitrary and conflicting, as applied, to be a violation of the Fifth Amendment.

It follows, therefore, that in the case at bar, which undeniably involves a discharge of industrial process water, the judgment of the District Court was in error; the order of the Court of Appeals, to the extent that it reversed the judgment of conviction, should be affirmed; and the case should be dismissed.

ARGUMENT.

The Government asserts in its Brief that Section 13 of the Rivers and Harbors Act of 1899 (hereinafter "the 1899 Act") provides an absolute prohibition against industrial discharges, absent a prior permit from the Secretary of the Army, describing it variously as a "flat ban" (p. 16), a declaration of "simple absolutes" (p. 15), and a "general *prohibition*" (p. 27).[1] In this case the "flat ban" is only sought to be invoked against industrial water users, but there is nothing in Section 13 that limits its application to industries. By its terms the section applies to discharges ". . . *from the shore*, wharf, manufacturing establishment, or mill of any kind . . ." (Emphasis added.) The words "industry" or "industrial" appear no place in the section, and the legislative history of the 1899 Act and its statutory antecedents clearly shows that the practices and abuses intended to be proscribed were not limited to the activities of those engaged in industry. Indeed, it would be absurd to determine the lawfulness of a discharge by the vocation of the party making it.

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1. This "no discharge" argument has been used by the Department of Justice in other so-called Refuse Act suits. In a pending case in the Northern District of Indiana, *United States* v. *United States Steel Corporation*, Civil No. 71 H 52, in answering defendant's interrogatories the Government has defined "refuse matter" as including: "all substances and pollutants (including heat or the absence thereof) which when introduced into water or a solution in which water is the solvent, are (1) totally foreign to that water or solution, or (2) increase the amount or concentration of such substances or pollutants (other than water) in that water or solution, or (3) cause a significant ecological disturbance in the receiving water or solution."

I.

SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U. S. C. § 407) DOES NOT APPLY TO THE DISCHARGES OF THE RESPONDENT CHALLENGED IN THIS CASE.

The 1899 Act was enacted to protect the navigable capacity of the nation's waterways and not as a pollution control measure in the modern context. It would be ludicrous to attribute to a 19th century Congress, as Mr. Justice Harlan once observed, an intent to establish forthwith "an absolute standard of purity which not only bore no relation to the prevailing practice of sewage disposal at the time, but also is impossible to achieve even under present day technology." *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 506 (1960). We shall not burden the Court by inclusion of quotations from respected scientific experts to support the self-evident fact that the extent and complexity of the ecological problems of the 1970's about which all of us must be concerned were not even suspected in the 1890's and are not fully understood by some even today.

A. Legislative History and Contemporaneous Construction of Section 13 of the 1899 Act When and After It Was Enacted Show It Was Not Intended to Apply to Discharges Having No Effect Upon Navigation.

The 1899 Act was enacted as a compilation of earlier statutes for the protection of the navigability of the nation's rivers, harbors, and other interstate waterways. Its legislative history clearly establishes that the purpose of the Act was the furtherance of navigation and the avoidance of considerable expense then being imposed upon the federal government in dredging the rivers and harbors of the United States which were becoming

obstructed by intentional dumping of garbage, dredgings, and other kinds of solid wastes. Much of this history was set forth in Justice Harlan's dissenting opinion in *United States* v. *Republic Steel Corporation*, 362 U. S. 482, 493 (1960) and was touched upon by Justice Douglas in *United States* v. *Standard Oil Company*, 384 U. S. 224, 230 (1966). A thorough treatment of the legislative history of the relevant acts is found in Comment, *"Discharging of New Wine into Old Wineskins; The Metamorphosis of the Rivers and Harbors Act of 1899,"* 33 U. Pitt. L. Rev., 483, 494-508 (1972).

The series of enactments which resulted in the Rivers and Harbors Act of 1899 were prompted by the decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 (1888), which held that there is no federal common law protecting the navigability of the nation's waterways.

The first congressional enactment concerning discharges in navigable waters was designed to protect New York Harbor and was adopted in 1886, the relevant section of which appears as a historical note, 33 U. S. C. A. § 441 p. 170 (1970). This statute was superseded by the Act of June 29, 1888, now appearing as Title 33 U. S. C. § 441, which prohibits the discharge into the harbor of New York (and into other harbors later added), of "refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets and sewers, and passing therefrom in liquid state."

Legislation of general application to all of the nation's waters was first enacted in 1890. Section 13 of the 1899 Act (now § 407 of Title 33 U. S. C.) was preceded by § 6 of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 453) and § 6 of the River and Harbors Act of September 18, 1894 (28 Stat. 363). The former provision, some-

times referred to as the "Dolph" bill, enacted in 1890, provided:

> "that it shall not be lawful to cast, throw, empty, or unload . . . from or out of any ship, . . . or . . . manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, sludge, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States *which shall tend to impede or obstruct navigation,* or to deposit or place, or cause, suffer or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, sludge, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters either by ordinary or high tides, or by storms or floods, or otherwise, *whereby navigation shall or may be impeded or obstructed.*" (Emphasis added.) 26 Stat. 453.

It further provided that such discharges might be allowed in places where they did not interfere with navigation.

The purpose of the 1894 Act was to aid in the enforcement of the 1890 statute quoted in part above, by providing for *in rem* actions against vessels discharging in violation of its terms, borrowing from the provisions in the New York Harbor Act of 1888. During debates preceding passage of the 1894 Act, one of the members of the House Rivers and Harbors Committee, who was also the floor manager of the bill, in response to a contention that his committee had no business adding regulatory provisions to an appropriation bill, said the committee's jurisdiction covered protection of navigation channels and protection against shore erosion, and concluded by asserting:

> "and certainly it covers the questions of the filling up of the navigable waters by deposits made in harbors or in rivers, and of the establishment of harbor lines,

matters which relate strictly to the improvement and maintenance of navigation." (Emphasis added.) See 26 Cong. Rec. 4358 (1894).

These precursors of Section 13 of the 1899 Act were compiled and codified by the Secretary of the Army and the Corps of Engineers by direction of Congress in H. Doc. No. 293, 54th Cong., 2d Sess. (Feb. 15, 1897). Section 5 of the draft legislation proposed in that report became Section 13 of the 1899 Act, the section under which the prosecution of PICCO was undertaken. The notable change of the redraft was the deletion of the long lists of substances specified in the 1890 version in favor of the general term "refuse matter of any kind or description". The phrase, "which shall tend to impede or obstruct navigation" which appeared in the 1890 act quoted above was omitted in the first portion of the codification, though navigation and anchorage were repeatedly referred to throughout the new section. For the reasons set forth below, the phrase was either considered unnecessary or was inadvertently omitted, unless it is concluded that the compilers intended to perpetrate a fraud upon the Congress. In the debates before the Senate, Senator Frye, the Chairman of the Senate Rivers and Harbors Committee, offered the bill as an amendment to the annual Rivers and Harbors Appropriation Act. It was suggested that the Clerk dispense with the reading of it because:

> "It was referred to a subcommittee of the Committee on Commerce, and they examined it very carefully and found it to be entirely correct and in accord with the statutes now in existence, only scattered, as I said before, from the beginning of the statutes down through to the end . . ." 32 Cong. Rec. 2296 (1899).

When one of his colleagues asked Senator Frye "whether there is any change made in the existing law by the amendments?", Senator Frye assured his colleagues that no changes were made, and said: "It is a compilation." 32 Cong. Rec. 2296 (1899).

In passing this Act, Congress could only have intended to exercise those powers it deemed itself to possess. In interpreting § 6 of the 1894 Act (which later became the first clause of what is now Section 13) the Attorney General of the United States stated unequivocally that the power of Congress was limited to the protection of navigation. In this opinion, *21 Opinions of the Attorney General 305*, the Attorney General was asked by the Secretary of War whether the War Department was required to act on a request for permission to dump mine tailings into a navigable water when, in the Secretary's opinion, such dumping would not affect navigation but could adversely affect fish, wildlife, and scenery. The Attorney General responded that it was the duty of the Secretary of War to act upon the permit, and when in his opinion navigation would not be adversely affected, the permit was to be granted regardless of other effects, since the latter were not within the power of the Secretary to consider.

An examination of the legislative history and background of the Rivers and Harbors Act of 1899 compels the conclusion that it was limited strictly to the protection of navigation, the works of navigation, and navigable capacity. As stated in *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140, 1145 (N. D. Ala. 1971), *aff'd.* 456 F. 2d 1294 (5th Cir. 1972), *cert. den.*, 41 U. S. L.W. 3442 (Feb. 20, 1973), a civil action by private parties seeking damages and injunctive relief under the 1899 Act for alleged water pollution:

> "This court concludes that the purposes and extent of the Rivers and Harbors Act was to assist the federal government in insuring that our navigable waterways remain free of obstructions and to protect the special interest in freedom from such obstructions of those who use the nation's waterways for purposes of navigation."[2]

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2. In *Guthrie* the plaintiffs-appellants in the courts below filed a petition in this Court for a writ of certiorari (No. 71-1672). Responding to the Court's request to express the Government's

In support of its contention that Section 13 was intended to deal with pollution as well as navigation the Government in reply may allude to statements made by one of the compilers of the 1899 Act, Judge G. W. Koonce. (Lecture by Judge G. W. Koonce, O. C. E., before the Company Officers Class of the Engineer School, Fort Humphreys, Virginia, April 23, 1926, as reported in "Water Pollution Control Legislation—1971 (Oversight of Existing Programs)," Hearings before the H. Comm. on Pub. Works, 92d Cong., 1st Sess., 284 (hereinafter cited as "the Oversight Hearings".) This *amicus* has no disagreement with Judge Koonce's assertion that the Government need not stay its hand until actual injury to navigation has occurred. It is potential as well as past injury to or interference with the navigational interest that is proscribed. But that is a far cry from the present contention that discharges of industrial process and cooling water having no conceivable adverse effect upon navigable capacity were intended to be covered by the Act. Judge Koonce did not suggest that he considered the thousands of such discharges, then going on continuously without any permits, were in violation of the Act.

B. The Express Language of Section 13 and Its Long History of Administration by the Executive Department Demonstrate That It Is a Navigation Statute.

A careful reading of the entire text of Section 13 makes it apparent that all portions of it are directly concerned with navigation, as distinguished from pollution control. The first portion of the section deals with material "other than that flowing from streets and sewers and passing therefrom in a liquid state" discharged directly into any

views about the case, it is interesting to note that the Department of Justice filed a brief earlier this year recommending denial of the writ. The petition was later denied by the Court on February 20, 1973.

navigable water or into any tributary from whence it shall float or be washed into such navigable waters. This clause clearly refers to that type of material which may have an effect on navigation. The second portion which deals with indirect discharges concludes with the words "whereby navigation shall or may be impeded or obstructed". The third portion excepts improvements in navigation from the operation of the section. In the fourth portion, the Corps of Engineers is given authority to grant permits for dumping but only when the Chief of Engineers finds that "anchorage and navigation will not be injured thereby". The only criterion to be applied to the granting of permits for discharges is that the discharge is not to interfere with "anchorage and navigation." The purpose, scope, and structure of this statute are geared to the protection of *navigation* and not to the problem of pollution.[3]

Throughout its history up to the issuance of Executive Order 11574 by the President directing the establishment of the "Refuse Act Permit Program" in December of 1970, Section 13 was not applied by the executive branch to discharges of the type here involved, *i.e.*, industrial process water discharges resulting from the use of water and consequent chemical and other changes effected by that use. The Government concedes that only four permits were ever issued for such discharges, and three of those were a part of the settlement of the litigation in *United States* v. *Republic Steel Corporation*, 362 U. S. 482 (1960).

3. The "semi-colon argument," namely, that *direct* discharges prohibited are not limited to those affecting navigation because the words "whereby navigation shall or may be impeded or obstructed" appear following the references to indirect discharges, would require treatment of the first portion of the section as though it were a separate section, rather than one of four portions of a whole. Moreover, even Professor Rodgers, a leading spokesman for judicial expansion of the section and frequently referred to in the Government's Brief, is candid enough to admit that such a distinction is "scientifically indefensible." Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 779 (1971).

(Government Brief, page 28, footnote 30) It is significant that these permits deal primarily with the allocation of costs of dredging flue dust from a river among the three defendants and the Government, because of their impairment of navigation, and do not purport to prohibit such discharges.

Indeed, the Government admits that the Corps of Engineers in its published regulations and administration of Section 13 treated it as a navigation statute for nearly 70 years. (Government Brief, pp. 11, 29) When the regulations were amended in 1968, they again made clear that the administrative interpretation of the Act was that it did not apply to the discharge of industrial process and cooling water. The new regulations noted that while Section 13 authorizes the Secretary of the Army to issue permits for discharges to navigable waters, and that it had been so used from time to time, "it is considered preferable to act under Section 4 of the Rivers and Harbors Act of 1905 (33 Stat. 1147, 33 U. S. C. § 419)." (33 C. F. R. § 209.200(c)(2)) Thus the 1899 Act was interpreted to provide for the establishment of dumping grounds for solid wastes, making no mention of discharges of industrial process water which was obviously not covered by the "dumping ground" provision.

It was only after the issuance on December 23, 1970 of Executive Order 11574 (35 F. R. 19627), directing the establishment of the "Refuse Act Permit Program", *without any change whatsoever in the statute itself by Congress,* that the Corps dutifully discovered that Section 13 applies to industrial process and cooling water. Robert E. Jordan, III, General Counsel of the Army and Special Assistant to the Secretary of the Army for Civil Functions, in a statement before the Conservation and Natural Resources Subcommittee on Government Operations on September 17, 1970 (1 Environment Reporter, Current Developments, 567) said:

> "Earlier this year, in testimony before the Subcommittee on Energy, Natural Resources and Environment of the Senate Commerce Committee, I announced a policy of the Department of the Army to enforce 33 U. S. C. 407—the so-called Refuse Act—against those discharging into navigable waters, by requiring permits for such activity. I noted then that the Department of the Army's current permit program was an implementation of Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403) *and that, historically, we have not had a formal permit program implementing Section 13 of the 1899 Act.*" (Emphasis added.)

Further corroboration is provided by the statement of Brig. Gen. Richard H. Groves, Deputy Director of Civil Works, Office of the Chief of Engineers, Department of the Army, on Thursday, June 3, 1971, in the Oversight Hearings at 263-264. He stated:

> "The Refuse Act contained provisions allowing the issuance of permits for the discharge or deposit of refuse matter under conditions prescribed by the Secretary of the Army. *This particular permit authority had never been used, since other sections of the 1899 Act provided adequate authority for controlling activities which might adversely affect navigation and the navigable capacity of our waterways.*" (Emphasis added.)

In other words, prior to December of 1970 there had never been a program applicable to the discharges which are the subject of the appeal now before the Court.

The foregoing interpretation, which is consistent with the complete absence of a permit program for the discharge of process water from industrial outfalls prior and subsequent to the *Republic Steel* case, clearly establishes that the officials charged with the interpretation of the section did not believe that it applied to the discharges which are the subject of this prosecution.

It is established that regulations have the force of law (*Belden* v. *Chase*, 150 U. S. 674, 698 (1893); *Shell Petroleum Co.* v. *Peschken*, 290 F. 2d 685 (3rd Cir. 1961)) and that courts should give great weight to long-standing and consistent formal administrative interpretation by the agency charged with administering legislation (*Udall* v. *Tallman*, 380 U. S. 1, 15 (1965)). Therefore, the administrative interpretation of Section 13 of the 1899 Act, which was never challenged or corrected by Congress, should be considered determinative of its true meaning. It establishes that Section 13 does not apply to discharges of the Respondent involved in this appeal.

Indeed, the fact that there had never been a permit program, formal or otherwise, administered by the Corps of Engineers or the Secretary of the Army seems to have been known to everyone but the Department of Justice, as observed in PICCO's brief opposing the petition for a writ of certiorari. Attempting to explain away Mr. Ruckelshaus' admission that there was no permit program prior to 1971 (see pages 3 and 4 of PICCO's brief in opposition to the petition), as being attributable to unfamiliarity with past practice displays a surprising lack of candor on the part of the Government.[4] The disingenuous suggestion that there had been some kind of informal regulatory permit program during the 70 years following passage of the 1899 Act reappears in the Government's Brief on the merits. (See p. 10)

The inference is that the Corps of Engineers and the Department of the Army and, in later years, the Environmental Protection Agency, were misinformed in concluding that Section 13 was intended to apply only to discharges

4. Mr. Ruckelshaus has distinguished company if he was uninformed on this matter. John R. Quarles, Jr., General Counsel of the EPA, on June 2, 1971, explained *why* there was no such program, saying: "The Refuse Act was enacted in 1899, and was never regarded as applying to water quality discharges until quite recently." (Oversight Hearings, 208)

tending to affect navigation, and, further, that water users should have known of this error and requested permits from the Corps and the Secretary of the Army. In fairness to those officials it should be pointed out that no other agency in the executive branch of the federal government, *including the Department of Justice itself*, appears to have taken any steps to prosecute the thousands of water users who have been violating federal criminal law throughout the 20th century, if the 1899 Act is a pollution control act, as the Department of Justice now contends.

C. The Judicial Construction of Section 13 Confirms This Administrative Interpretation.

1. Decisions of This Court Do Not Support the Government's Present Contention.

The attempt to expand Section 13 into a pollution control statute must rest upon two cases decided by this Court, *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960) and *United States* v. *Standard Oil Co.*, 384 U. S. 224 (1966). Those cases neither hold, nor, when fairly read, support the argument that *all* industrial process and cooling water discharges (described as "industrial waste" in the Government's Brief) are unlawful, absent a prior discharge permit. It is a technological impossibility to utilize water for any purpose and return it with precisely the same levels of chemical and other constituents and at precisely the same temperature as the receiving waters into which the discharge flows.[5]

5. As the National Water Commission has observed in the Review Draft of its Report to Congress: "The danger of a no discharge policy lies not merely in its conceptual unsoundness, but in its potential for doing long-term harm to the pollution control effort. Like other oversimplified solutions to complex social problems, the no discharge policy *holds out a promise of clean water it cannot redeem.*" Review Draft of Report of the National Water Commission at p. 4-6 (November 1972.) (Emphasis added.)

It must also be recognized that both *Republic Steel* and *Standard Oil* dealt with discharges made prior to the enactment of the Water Quality Act of 1965, in which Congress established a regulatory program dealing with water pollution control. (See Point II, *infra*) Both cases arose before there had been any suggestion that the 1899 Act might be considered a pollution control measure in a modern context. Furthermore, language in *Standard Oil* seized upon by the Government in this appeal was not known to Congress when the 1965 Act was adopted, because the decision came in the following year.

Republic Steel was a civil action based upon Section 10 of the 1899 Act (33 U. S. C. § 403) which prohibits the creation of obstructions to navigation. Section 13 was involved only to the extent that the defendants contended that even if it were assumed that the suspended solids being discharged constituted an obstruction to navigation, such discharges were legal under Section 13, which excepts discharges "flowing from streets and sewers and passing therefrom in a liquid state." The Court held that the discharges were not within the exception, and in doing so relied on the administrative interpretation requiring removal of solids from a river which, through build-up on the bottom, had obstructed navigation. 362 U. S. 482, 490 (1960). The Court did not consider in that decision whether discharges which did not create an actual obstruction to the navigable capacity of a river were illegal under either Section 10 or Section 13 of the 1899 Act.

The parties in *Republic Steel*, the Government included, thought they were dealing with a statute designed to protect against potential injury to navigable capacity, not a pollution control measure. At pages 16 and 17 of its petition for a writ of certiorari in *Republic Steel* the Government stated:

> "We are not dealing here with a statute aimed at the prevention of *ordinary pollution*, but with prohibi-

> tions against interference with navigation and the policy of Congress, unchanged since 1899, of compelling riparian owners and users of navigable streams to bear the burden of eliminating any injury to *navigable capacity* their use may produce." (Emphasis added.)

At page 34 of its Appellant's Brief the Government informed the Court:

> "The problem of pollution of streams, navigable or non-navigable, has no direct bearing on the present case, which is addressed to the obstruction of *navigable capacity.*" (Emphasis added.)

Further, *Standard Oil* held only that commercially valuable gasoline could constitute "refuse matter" when introduced into a navigable water from whence it could not be recovered. The matter was presented on a stipulation of facts which established that there had been a single accidental discharge of commercially valuable gasoline into the St. Johns River because a shut-off valve at dockside had been left open and that this was the only discharge involved. The case was briefed and argued before the Court on the sole issue of whether the commercially valuable nature of the gasoline made it something other than refuse matter. On the record before the Court, there was no need to consider whether all industrial process and cooling waters flowing into the nation's waterways are prohibited as being "refuse matter" intended to be proscribed by Congress in 1899 and it was not so considered. The Court examined the legislative history of the Act and its statutory antecedents which established that the commercial value of the material discharged had never been taken into account in determining what was to be banned, but, rather, that the substances enumerated in the statute appeared all to be of such nature as would cause an actual obstruction or danger to navigation.

Transformation of Section 13 into a pollution control statute must be based entirely upon usage of the term

"pollution" by the majority in *Standard Oil,* principally the assertion that: "The word 'refuse' includes all foreign substances *and pollutants* apart from those 'flowing from streets and sewers and passing therefrom in a liquid state'." 384 U. S. 224, 230. (Emphasis added.) But the question of whether Section 13 applies to discharges having no effect upon navigation had not been put in issue. Therefore, even if the emphasized words were construed as the Government contends, it is undeniably clear that they are dicta. Moreover, such an expansive interpretation overlooks other assertions in the majority opinion that the presence of gasoline in navigable waters is a menace to navigation. 384 U. S. at 226.

2. Decisions of the Courts Below Are Inconclusive on the Navigation Question.

Two cases in the Second Circuit exemplify the confusion on the issue. *United States* v. *Ballard Oil Co. of Hartford,* 195 F. 2d 369 (2nd Cir. 1952) is cited by the Government in support of the contention that the criminal sanction of Section 13 is not limited to discharges that might impede or obstruct navigation. (Government Brief, p. 16) *Ballard Oil* held that the negligent pumping of 6700 barrels of heavy fuel oil from a tanker into a river violated Section 13. No one would contend that such a discharge, described as "a black tarry looking mass" being "one inch thick on top of the water," would not impede or adversely affect navigation. Moreover, neither the ultimate purpose of the section nor the effect of the discharge upon navigation was in issue. The Court merely said the district court's finding that the discharge affected navigation did not compel the conclusion that the defendant had been convicted of violating the second clause of Section 13 instead of the first. On the other hand, in the later case of *Nicroli* v. *Den Norske Afrika-Og Australielinie, etc.,* 332 F. 2d 651 (2nd Cir. 1964), the defendant argued that Section 13, and a

section of an Act of 1888 concerning New York harbor now in 33 U. S. C. § 441, prevented a shipowner from hosing spilled sugar off the deck of a ship into the harbor. After examining the statutes the Second Circuit concluded at page 655:

> "Though the statutory language is broad, the *purpose* of these statutes is to prevent the discharge of matter *which will clog or obstruct the harbor or other navigable waters.*" (Emphasis added.)

The Government has frequently cited *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (3rd Cir. 1967) in support of its argument. That case also involved a discharge of oil, this time on the shore from which it flowed into the ocean by gravity. The only issue was whether the point of discharge was too remote from the water to support a conviction. The Court's recitation of the agreement of the Government and the defendant, incorporated in a stipulation of the parties to expedite the trial, that the discharge did not impede navigation cannot be treated as an adjudication of that question.

Only in *La Merced*, 84 F. 2d 444 (9th Cir. 1936) could it be said that a Court of Appeals has held that the effect of a discharge upon navigation is irrelevant. However, *La Merced* was an admiralty action against a vessel from which oil was "thrown, discharged and deposited" in a lake while at anchor (84 F. 2d 444), as distinguished from process or drainage water discharges. Moreover, the court did not consider the legislative history of the 1899 Act. Admittedly, commencing with *United States* v. *Interlake Steel Corporation*, 297 F. Supp. 912 (N. D. Ill. 1969) a number of district courts, without full consideration of either the legislative history or purpose of Section 13, or the absence of a viable permit program, and without manifesting full understanding of the purpose of the Federal Water Pollution Control Act, or the impossibility

of complying with the Government's distortion of Section 13, have held in favor of the Government's position.[6]

Arrayed against these cases, however, are numerous decisions involving civil actions for alleged violations of Section 13 in which Courts of Appeals and district courts have held that the purpose of Section 13 was to protect navigation. *United States* v. *Bigan*, 274 F. 2d 729 (3rd Cir. 1960); *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (N. D. Ala. 1971), *aff'd.* 456 F. 2d 1294 (5th Cir. 1972), *cert. denied*, 41 U. S. L. W. 3442 (Feb. 20, 1973); *Chambers-Liberty Counties Navigation District* v. *Parker Brothers & Co.*, 263 F. Supp. 602, 607 (S. D. Tex. 1967).

II.

SECTION 13 OF THE 1899 ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT MUST BE CONSTRUED TOGETHER SO AS TO GIVE THE FULLEST POSSIBLE EFFECT TO THE CENTRAL PURPOSES OF BOTH.

There are some who contend that if Section 13 of the 1899 Act does not apply to industrial process and cooling water, those discharges are, in reality, free of control. This is demonstrably not true. In some instances it stems from misunderstanding the full thrust and reach of the Federal Water Pollution Control Act (33 U. S. C. §§ 1151, *et seq.*, hereinafter "the Control Act") and especially

6. The recent case of *United States* v. *Granite State Packing Co.*, 470 F. 2d 303 (1st Cir. 1972), involved animal wastes that could adversely affect navigation and the defense rejected by the Court was that the discharge went into a municipal sewer system, not directly into the river. This was a fact issue. However, the Court went on to brush aside the defendant's claim that if there were no administrative procedures whereby it could have obtained a permit, the statute is unconstitutional. The decision contains nothing to indicate that the court considered the consequences of treating Section 13 as an absolute prohibition. We have only the Court's ipse dixit that the statute "forbids certain conduct, with exceptions" (whatever they are), and thus the decision has little precedential value.

§ 1160 together with other changes made by the Water Quality Act of 1965, described *infra*. Contrary to the implication in the Government's Brief at pages 10 and 26, the Control Act does not provide for a State-controlled program with little or no federal control over the formulation or enforcement features. The 1965 amendments to the Control Act make this implication totally unwarranted. Section 10 of the Control Act (33 U. S. C. § 1160), as rewritten in the Water Quality Act of 1965, created a comprehensive program for the control of water pollution in the nation's waterways. In general, it provides for establishing water quality standards and implementation plans for the nation's interstate waters. The States, pursuant to the specific directions of Congress, are given the first chance to formulate these standards and plans for implementation (§ 1160(c)(1)), which are then submitted to the Federal Environmental Protection Agency for its approval. If the Administrator of EPA approves them, they become the federal standards for those waterways. If he does not, a Hearing Board is appointed to set the standards. If industrial and other water users subject to the standards and implementation plans do not abide by them, they are subject to enforcement measures, including suits to be brought on behalf of the United States by the Attorney General in the manner and circumstances provided by § 1160(c)(5) and § 1160(g)(1) and (2) of Title 33 U. S. C. A brief history of the Control Act will explain much of the confusion that has arisen concerning its paramount place in water quality control and will make clear the necessity for accommodation with the 1899 Act.[7]

7. The suggestion at page 20 of the Government's Brief that the federal government has no court enforcement power under the Control Act except as to "interstate waters" is misleading. Pollution of all navigable waters is subject to abatement under the conference procedures provided in §§ 1160(d), (e) and (f). If the federal authority is dissatisfied with the abatement program, the

A. History of the Federal Water Pollution Control Act.

The original Control Act (62 Stat. 1155-1161) was enacted in 1948. It was designed primarily to encourage state and local water pollution control, provide for federal cooperation and focus public attention on particular water pollution problems through a process of conferences, but it was not a comprehensive water quality control program.

The Act was amended in 1956 so as to expand greatly the power of the federal government over the pollution of interstate waters, but it still did not assume the all-encompassing scope of the present statute. Section 8 of the 1956 Act (now Title 33 U. S. C. § 1160) provided for the convening of conferences to determine the existence of pollution (§ 1160(d)), notice to state agencies to take the necessary action to abate the pollution (§ 1160(e)), public hearings if the state agency fails to take adequate action to abate the pollution (§ 1160(f)), and, finally, if adequate action has not been taken within the time allowed following the hearing, court action at the request of the Secretary of Health, Education and Welfare,[8] in the case of pollution endangering the health or welfare of any person, the sole qualification being that, if the only persons alleged to be endangered and all the alleged contributors to the pollution are located in one state, the Governor of that state must consent to filing the suit (§ 1160(g)).

In 1961 the Act was amended to cover navigable as well

Attorney General is authorized to bring a suit on behalf of the United States to secure abatement pursuant to § 1160(g). The reference to "interstate waters" applies only to alleged violation of water quality standards established under § 1160(c).

8. Functions under the Control Act were transferred to the Secretary of the Interior, pursuant to Reorganization Plan No. 2 of 1966. (31 F. R. 6857) Later all functions vested in the Secretary or Department of the Interior by the Control Act were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970. (35 F. R. 15623)

as interstate waters, but the amendments did not materially change the conference, hearing and notice procedures which were provided for in the 1956 amendments.

In 1965, however, the Control Act was transformed from a cumbersome program, geared in substantial degree to state initiation, into a comprehensive federal program of regulation and enforcement. The Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903, changed the first section of the Control Act (now § 1151(a) of Title 33) to provide:

> "The purpose of this act is to enhance the quality and value of our water resources and *to establish a national policy for the prevention, control, and abatement of water pollution.*" (Emphasis added.)

More significantly, the 1965 amendments provided for adoption of federal water quality standards and implementation plans for all interstate waters within the United States. Title 33 U. S. C. § 1160(c)(1) gave initially to the States the opportunity to formulate the standards for the waters within their jurisdictions but stated that, "*If the Secretary* determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter *be the water quality standards applicable to such interstate water or portions thereof.*" (Emphasis added.) If the States failed to formulate standards meeting the federal requirements, the Secretary of Health, Education and Welfare (now the Administrator of the Environmental Protection Agency, see footnote 8, *supra*) was empowered to promulgate such regulations. (§ 1160(c)(2)) The implementation plans adopted pursuant to the 1965 Act consisted of treatment or discharge guidelines, standards and timetables. They were subject to federal enforcement under the Act. (§ 1160 (c)(5))

Thus, in 1965 the Control Act was transformed from a program of grants and encouragement of state efforts to

control water pollution, as it had originally been drawn in 1948, into a detailed and comprehensive system of federal regulation. There was no need at that time for Congress expressly to negate any parallel or conflicting jurisdiction of the Secretary of the Army to regulate pollution under Section 13, because neither the Secretary nor any other federal agency at the time thought that permits were required except under Section 10 of the 1899 Act relating to possible obstructions to navigation. (See Statement of Robert E. Jordan, General Counsel of the Army, *supra*, at page 14.)

If any additional evidence is needed that Congress in 1965 and thereafter intended to regulate discharges having an effect upon water quality in the Control Act, it can be found in the highly significant addition to the water quality standard-setting provision in § 1160(c)(3) by the Water Quality Improvement Act of 1970 (Pub. L. 91-224, 84 Stat. 91):

> "In establishing such standards the Secretary [of the Interior, later changed to the Administrator of the Environmental Protection Agency], the hearing board, or the appropriate State authority shall take into consideration their use and value for navigation." See 33 U. S. C. § 1160(c)(3) and Historical Note following 33 U. S. C. A. § 1160.

The addition of this sentence shows that Congress intended the Secretary of the Interior (later changed to the Administrator of the EPA) to have control over discharges affecting water quality but that he should protect navigation to the extent that the discharges might affect it. This sentence is totally inconsistent with the Government's contention that the Secretary of the Army has complete control of discharges of process, cooling and drainage water that are of concern because of their pollutional effect, irrespective of whether those discharges affect navigation.

B. If the Control Act and Section 13 Are Not Construed in Pari Materia, They Are Irreconcilable.

The policy behind the federal water pollution control program incorporated in the Control Act is to provide a mechanism to consider the varying and often conflicting uses of any given body of water or stretch of a river, to establish priorities for such uses, to fix specific limits on the chemical and other constituents permitted so as to protect those uses, and to force compliance with the specific standards by suits for abatement brought by the Attorney General. (33 U. S. C. §§ 1160(c) through (g)) The water quality standards and implementation plans established under the Control Act are meaningless if, regardless of how precise and stringent they may be, any United States Attorney has the power to prosecute every water user whose discharge is not identical in all respects with the receiving water.[9]

Even if it were assumed *arguendo* that Section 13 of the 1899 Act is not limited in its application to discharges directly or physically impeding navigation, it must be admitted that the central purpose of the 1899 Act was to protect the navigational interests of the United States. Certainly it is manifest that the central purpose of the Control Act was to establish a program for the control and abate-

9. As noted by the author frequently called upon by the Government in its Brief, this construction of Section 13 is a "no discharge mandate" and gives the federal prosecutor "life-and-death leverage" over every water user in the nation. Rodgers, *supra*, at page 816.

Another spokesman for such an absolute standard, which is to be "ameliorated through practical application", urges "Reliance on the prosecutor to be sensible . . ." and at the same time concedes that "It is unlikely that 'zero' discharge can ever be achieved." Sandler, *The Refuse Act of 1899: Key to Clean Water*, 58 A. B. A. J. 468, 470-471 (1972). Given this absolute interpretation it is not surprising that the Government can boast about a high conviction rate in footnote 16 on page 18 of its Brief.

ment of water pollution.[10] The conclusion must be that the central purposes of the two Acts are totally irreconcilable if the Government's interpretation of the 1899 Act as a complete or "general" prohibition is accepted.

This Court held in *The Boys Markets, Inc.* v. *Retail Clerks' Union Local 770,* 398 U. S. 235 (1970) that, where two statutes enacted at greatly disparate times appear to conflict, it becomes the task of the courts to accommodate and reconcile the older statute with the more recent one. *The Boys Markets* case involved a suit brought under Section 301 of the Labor Management Relations Act, Title 39 U. S. C. § 185(a), and the Court upheld an injunction against a strike in violation of a collective bargaining agreement containing a compulsory arbitration clause, notwithstanding the literal terms of the Norris-LaGuardia Act, Title 29 U. S. C. § 104, as well as the Court's previous decision in *Sinclair Refinery Co.* v. *Atkinson,* 370 U. S. 195 (1962). In *The Boys Markets,* 398 U. S. 235 at pages 250, 251, the Court stated:

> "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor-Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies which inspired ostensibly inconsistent provisions. See *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956); *United States* v. *Hutcheson,* 312 U. S. 219, 235 (1941).
>
> • • • • •

10. The Department of Justice has tacitly conceded this. The Department's *Guidelines for Litigation Under the Refuse Act,* issued to United States Attorneys in June, 1970, in speaking of continuing discharges resulting from the ordinary operations of a plant, stated that "it is precisely this type of discharge that the Congress created the Federal Water Quality Administration to decrease or eliminate." 1 Environment Reporter, Current Developments, 288 (1970).

> "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. *Thus, it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.*" (Emphasis added.)

The Government's contention that the 1899 Act, in effect, supersedes the later Control Act rests in part upon a savings provision that has been in the Control Act since its original enactment in 1948, 33 U. S. C. § 1174. (Government's Brief, page 20) The section provides:

> "This Chapter [the Control Act] shall not be construed as (1) superseding or limiting the functions, under any other law, of the Surgeon General or of the Public Health Service, or of any other officer or agency of the United States, *relating to water pollution*, or (2) affecting or impairing the provisions of sections 407, 408, 409 and 411 to 413 of this title, or (3) affecting or impairing the provisions of any treaty of the United States." (Emphasis added.)

The separation of the section into three separate clauses, the first referring to water pollution laws, the second to provisions in the 1899 Act, and the third to treaties, is added confirmation that the Congress did not consider the 1899 Act as "relating to water pollution."

However, if this, too, is ignored the Court is confronted with a classic example for the application of the doctrine of accommodation, since there are two statutes relating to the same subject matter that contain conflicting purposes and provisions. Accommodation does not suggest a repeal of one statute by the other, but a reconciliation of both so as

to deprive neither of meaning while preserving the essential purposes of both. As applied to this case, accommodation does not involve in the slightest a diminution of the statutory purpose of Section 13 or its historic application because, until three years ago, it had never been applied in a criminal prosecution for the discharge of industrial process water.

The proper role of accommodation is described by Justice Brennan in his dissenting opinion in *Sinclair Refinery Co.* v. *Atkinson*, 370 U. S. 195, 216 (1962) (adopted by the Court as the correct statement of the law in *The Boys Markets* and overruling the *Sinclair Refinery Co.* case) where he stated:

> "Of course § 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' § 4 of the Norris-LaGuardia Act. But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. *Our duty therefore, is to give the fullest possible effect to the central purposes of both.*" (Emphasis added.)

Reliance by the Court of Appeals in *PICCO* upon § 1174 of the Control Act as a basis for declining to define "refuse" in terms of water quality standards established under that Act suggests a misunderstanding of both the history and language of § 1174, for the reasons stated above. While the court refused, erroneously we submit, to adopt the defendant's version of accommodation, it did, as it must, recognize that in neither *Republic Steel* nor *Standard Oil* did this Court "find that Congress intended to prohibit all such discharges." 461 F. 2d 468, 473. The Court of Appeals in *PICCO* was forced to conclude at page 473:

> "There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters."

Confronted with the otherwise irreconcilable statutes, the Court was compelled to rely upon the permit program contemplated by Section 13 to make the two statutes compatible. The crucial factor was the rejection of the unfounded notion that Section 13 provides an absolute prohibition against any industrial discharge—the so-called "no discharge mandate" as it is described by one of the Government's authorities. Rodgers, *supra*, at page 816.

In sum, *PICCO* stands for the proposition that Section 13 and the Control Act must be accommodated and that Congress contemplated a regulatory program supported by a viable permit system under Section 13—because the only alternative would be to find that virtually all of the nation's water users are misdemeanants operating only because the Department of Justice has not yet chosen to prosecute them.

Amicus submits that applying the 1899 Act to those discharges affecting navigation which have traditionally been regulated under that Act, and treating the Control Act as governing process, cooling and drainage water discharges which affect water quality is the only way, in the words of Justice Brennan in *Sinclair Refinery Co., supra*, "to give the fullest possible effect to the central purposes of both."[11]

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11. The Temporary Emergency Court of Appeals recently reconciled an apparent conflict between the Norris-LaGuardia Act (29 U. S. C. § 101, *et seq.*) and the Economic Stabilization Act of 1970 (12 U. S. C. § 1904 (note)) by holding that the prohibition against the granting of injunctions contained in Norris-LaGuardia must give way to the recently enacted Economic Stabilization Act. *McGuire Shaft and Tunnel Corp.* v. *Local Union No. 1791, United Mine Workers of America*, ... F. 2d ....., 20 WH Cases 1147 (T. E. C. A. Feb. 1, 1973). The Court stated:

> "In light of the importance of the Economic Stabilization Program to economic welfare of the United States, the Norris-LaGuardia Act must be interpreted to accommodate the overriding Congressional intent expressed in the Economic Stabilization Act. Such accommodations have been made in the past when the provisions of the Norris-LaGuardia Act conflicted with other specific intentions of Congress."

C. Adoption of Point I of the Government's Brief Would Emasculate the Control Act, as Amended by Congress in 1972.

Amicus recognizes that the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "the 1972 Amendments"), do not apply to the industrial discharges challenged in this case. However, the Court's decision may have a profound effect upon the effectiveness of the comprehensive national program so painstakenly devised by Congress in the 1972 Amendments.

Running throughout the Government's Brief is the theme of dissatisfaction with the Control Act, supported by frequent references to several writers who have expressed their impatience with the Congress in failing to enact legislation to deal with the complex problems of environmental controls for contemporary society in the fashion deemed advisable by the writers. Indeed, the distorted interpretation of the 1899 Act pressed upon the Court appears to spring from this dissatisfaction or disagreement with the Congress. That is the reason, we are told, why the Department of Justice has turned to the 1899 Act as the "only effective legislative bulwark" against "industrial assault." Government Brief, p. 15.

The federal law of water pollution control was completely rewritten in the 1972 Amendments, establishing one of the most detailed and comprehensive enactments ever adopted by the Congress. In addition to providing for extensive research programs and sharply increased federal grants for construction of treatment facilities, the 1972 Amendments create the framework for a program regulating all discharges into waterways by establishing specific effluent limitations to be developed under the aegis of the Environmental Protection Agency by means of a national system of discharge permits.

An examination of the pertinent provisions of the 1972 Amendments demonstrates that the relationship between Section 13 of the 1899 Act and the Control Act, as revised, is consistent with the interpretation of Section 13 urged here by *amicus,* Chamber of Commerce. The 1972 Amendments reconcile the 1899 Act with the program designed to maintain the integrity of the nation's waters under the Control Act so as to preserve the central purposes of both laws.

In Section 502 of the 1972 Amendments "point source" is defined to include any discernible and discrete conveyance by a pipe, ditch or other conduit from which pollutants may be discharged (§ 502(14)), and "pollution" is defined as "man-induced alteration of the chemical, physical, biological, and radiological integrity of water." (§ 502(19))

Section 301 provides that effluent limitations must be established for point sources, and discharges not complying with those limitations shall be unlawful and subject to severe civil and criminal sanctions.

Section 402 establishes a National Pollutant Discharge Elimination System, to be implemented through a permit-granting program to be set up by the Administrator of the Environmental Protection Agency under guidelines provided in Section 402(a).

Without recognizing any validity in the Refuse Act Permit Program, established in December, 1970 by Executive Order 11574 (35 F. R. 19627) without any Congressional authorization whatever, but seeking to utilize data collected and work done by the Environmental Protection Agency in attempting to implement that Program, Section 402(a)(4) validates the Section 13 permits already issued.[12]

12. About 23,000 applications were submitted by water users pursuant to Executive Order 11574 (3 Environment Reporter, Current Developments, 795), but only 21 permits were issued. It is worth noting that those administering the Permit Program did not limit it to industrial discharges. Permits were issued to discharge backwash water from swimming pools at the Air Force Academy

However, in Section 402(a)(5) Congress expressly prohibits the issuance of any permits under the purported authority of Section 13 after the date of enactment of the 1972 Amendments.

Section 402(k) provides, *inter alia,* that, until December 31, 1974, where pending permit applications have not been acted upon, discharges shall not be a violation of the standards to be established under Sections 301 and 402, or a violation of Section 13. This is not an affirmation of the validity of the Refuse Act Permit Program or the attempted use of Section 13 as a pollution control measure. It simply defers prosecutions under the Control Act for a specified period of time to allow the immense administrative machinery to be set up and permit applications to be processed.

In the first section of the 1972 Amendments Congress has expressly vested in the Administrator of the Environmental Protection Agency the complete authority and responsibility for administration of the enormously far reaching water control program only a part of which is touched upon above. (§ 101(d)) The Secretary of the Army's historical role is retained in Sections 404 and 511.

Section 404 provides that the Secretary of the Army may continue to issue permits for discharges of dredged or fill material at specified disposal sites, and Section 511 preserves the authority of the Secretary of the Army to maintain navigation, making it clear by reference to Section 404 that the Secretary's permit authority relates to enforcement of the prohibition on obstructions to navigation under Section 10 of the 1899 Act (33 U. S. C. § 403).

If Section 13 provides a "no discharge mandate," unless a permit is first obtained, which is the first and principal

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in Colorado and a Boy Scouts of America facility in Oklahoma. Another permit went to a medical foundation in New Orleans to discharge cooling water from air conditioners. (2 Environment Reporter, Current Developments, 1487)

argument advanced in the Government's Brief, and permits under Section 13 cannot be granted by the Secretary of the Army, the advocates of the absolute prohibition interpretation of the 19th century act will have frustrated the Congressional program incorporated in the 1972 Amendments. The obvious and only commonsense conclusion is that in § 402(a)(5) Congress has once again manifested its view that the 1899 Act is not intended to be a water pollution control measure and does not apply to discharges of process, cooling and drainage water that are clearly regulated under the 1972 Control Act.

III.

IF SECTION 13 AND THE CONTROL ACT ARE NOT ACCOMODATED, THEIR APPLICATION VIOLATES THE DUE PROCESS CLAUSE.

If Section 13 is not construed in *pari materia* with the Control Act, then the former constitutes a regulatory scheme so vague and arbitrary as to be unconstitutional for the reasons set forth in the third section of the decision of the Third Circuit in *PICCO*.

As viewed by the Government, Section 13 provides an absolute prohibition of all discharges made without a permit. On the other hand, discharges meeting standards permitting specified levels of constituents are permitted under the Control Act. The fault is not that of Congress in enacting the statutes but that of those who assert that they should be applied so as to produce this absurd result.

At page 27 of its Brief the Government appears to contend that the Secretary of the Army is vested with this untrammeled discretion,[13] saying that "Congress has pre-

13. This theory of absolute power in the Secretary was adopted by the trial court in *PICCO*. In his charge to the jury, the trial judge said that "if the Secretary of the Army in his discretion, decided not to give anybody a permit, *so be it*." (Emphasis added) (Appendix, p. 211.)

scribed stricter controls over all discharges of refuse that may, in the Secretary's discretion, be excused from the 1899 proscription, so that foreign effluents having an *impermissibly* high waste content will no longer be deposited into our nation's navigable waters." (Emphasis added.) What does "impermissibly" mean? What standards are to be applied for the guidance of both the regulating authority and those being regulated in determining this permissibility?

It must be remembered that Section 13 is a criminal statute. As stated by the Court in *Jordan* v. *DeGeorge*, 341 U. S. 223, 230 (1951), in upholding the immigration statute requiring deportation for crimes of moral turpitude, "This Court has repeatedly stated that criminal statutes which fail to give notice that an act has been made criminal before it is done are unconstitutional deprivations of due process." *Baggett* v. *Bullitt*, 377 U. S. 360, 366-67 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).

If the 1899 Act is treated as a prohibition of all discharges of industrial process and cooling water without a permit when none was available, without reference to their effect on navigation or any other public interest, it is arbitrary, capricious and unconstitutional as applied. While the decisions in *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934) and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) rejected the earlier substantive due process arguments on which much social legislation was struck down, they recognized the fundamental doctrine urged here. The Court stated in *Nebbia:*

> "And the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.*" (Emphasis added.)

It would make a mockery out of this simple but fundamental right if we were to accept the thesis of an Assistant

United States Attorney, Chief of the Environmental Protection Unit in one of the federal districts, who advocates "Reliance on the prosecutor to be sensible." Sandler, *supra* at footnote 9. Hundreds of commercial and industrial enterprises, in cooperation with the Environmental Protection Agency which is charged with administration of the massive program mandated under the 1972 Amendments, are devising even more comprehensive and stringent discharge standards than were provided under the prior terms of the Control Act. Must all those who in good faith and at enormous cost construct treatment facilities meeting the effluent standards still operate only at the sufferance of the federal prosecutors throughout the country!

Last year this Court struck down a vagrancy law for the reasons, *inter alia,* that it encouraged "arbitrary and erratic arrests and convictions and placed almost unfettered discretion in the hands of the police. *Papachristou* v. *City of Jacksonville,* 92 S. Ct. 839 (1972). In *Papachristou,* the Court cited with approval the previous decision in *United States* v. *Reese,* 92 U. S. 214 (1875), in which two inspectors of a municipal election were indicted for violation of a penal statute regulating elections. The Court noted in *Reese:*

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power." 92 U. S. 214, 221.

Further, the Court in *Papachristou* quoted with approval the observations of President Roosevelt in vetoing a penal vagrancy law for the District of Columbia:

" 'It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.' H. Doc. 392, 77th Cong., 1st Sess." 92 S. Ct. 839 at 846, n. 10.

Amicus submits that the same considerations of due process and protection against "arbitrary and erratic arrests and convictions" that apply to those charged with vagrancy should also apply to the countless thousands of citizens from whose premises water is discharged into the nation's streams and lakes.

CONCLUSION.

The question confronting the Court in this appeal is not that of whether Congress has provided a water pollution control program satisfactory to the executive branch of government. The real question here is whether a 19th century criminal statute relating to navigation can be transformed into an absolute ban on discharges into our waterways by usurpation of the legislative function, to be ameliorated solely, if at all, by the exercise of prosecutorial discretion.

The fundamental issue underlying this controversy was stated with great clarity by Mr. John R. Quarles, Jr., General Counsel of the Environmental Protection Agency, in addressing an American Bar Association National Institute a few days after Congress adopted, over Presidential veto, the Federal Water Pollution Control Act Amendments of 1972. Mr. Quarles hailed the new law and concluded by saying:

"Governmental regulation is necessary in certain areas of the life of our society. Pollution control is one. When regulation is required, it should be effective within its legal framework. This has not been true with regard to water pollution. Soon it will be. *All of us in this field should look forward with gratification and relief to the establishment—at long last—of an effective Rule of Law.*" (Emphasis added.) 3 Environment Reporter, Current Developments, 793 at 795.

For the reasons set forth in this brief, the Chamber of Commerce of the United States of America urges the Court to hold that the respondent's discharges challenged in this appeal and all similar discharges of process, cooling and drainage water are subject to regulation under the Control Act and not the 1899 Act.

Respectfully submitted,

MILTON A. SMITH,
1615 H Street, N. W.,
Washington, D. C. 20006,

HENRY L. PITTS,
208 South La Salle Street,
Chicago, Illinois 60604,
Counsel for the Chamber of Commerce of the United States of America.

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Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICI CURIAE UNITED STATES STEEL CORPORATION AND WHEELNG-PITTSBURGH STEEL CORPORATION URGING AFFIRMANCE

DAVID MCNEIL OLDS
JOHN MCN. CRAMER
REED SMITH SHAW & MCCLAY
P. O. Box 2009
Pittsburgh, Pennsylvania
Attorneys for Amici Curiae

WILLIAM FOSTER
Senior General Attorney
United States Steel Corporation

FRANCIS ST. C. O'LEARY
General Counsel
Wheeling-Pittsburgh Steel Corporation
OF COUNSEL

March 12, 1973

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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QUESTIONS PRESENTED

1. Whether Defendant can be prosecuted for its failure to hold a permit under Section 13 of the Refuse Act of 1899 (33 U.S.C. § 407), for a discharge of treated wastewater with no tendency adversely to affect navigation alleged to meet applicable water quality criteria which took place in the summer of 1970 prior to the creation of a program for the issuance of permits governing such discharges.

2. Whether the Defendant's claim that it was affirmatively misled by the Corps of Engineers into believing that no permit from the Corps of Engineers was necessary to discharge into the Monongahela River treated wastewater with no tendency adversely to affect navigation is an adequate defense to the present prosecution.

STATEMENT OF THE CASE

Respondent, Pennsylvania Industrial Chemical Corporation (hereinafter referred to as "PICCO"), like each of the amici, owns and operates a manufacturing establishment on the Monongahela River south of Pittsburgh in the Western Pennsylvania area. It has two outfalls to the Monongahela River. One outfall, an iron pipe, carries cooling water and process water which has passed through an industrial waste treatment facility from the plant to the Monongahela River. The other outfall, a concrete pipe, carries to the river domestic wastes from several private dwellings in the vicinity of the plant as well as cooling water and treated process water from the plant. At the time of the events involved in the instant litigation, PICCO held permits from the Commonwealth of Pennsylvania for its use of the two outfalls. These permits provided that the discharge from these outfalls must comply with the water quality standards established by the Clean Streams Law of the Commonwealth of Pennsylvania, 35 Purdon's Statutes, § 691.1 et seq., and the regulations promulgated thereunder. The standards contained in the Pennsylvania regulation had been adopted by the Secretary of the Interior as the federal standards applicable to interstate waters in the Commonwealth of Pennsylvania in 1967 pursuant to the requirements of the Federal Water Pollution Control Act, as amended.* Hence, by complying with the terms of its permits, PICCO complied with both state and federal water quality standards governing its discharge into the Monongahela.

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*The Pennsylvania standards are adopted as the federal standards at 40 C.F.R., Ch. I, Part 120.10.

Statement of the Case.

PICCO was charged in the four-count information in the instant case with discharging into the Monongahela River certain "refuse" matter, "to-wit, iron, aluminum and compounds containing these chemicals, and chlorides, phosphates, sulphates and solids"** in violation of Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C., Sections 407 and 411. The charges were based upon samples taken on August 7 and August 19, 1970. The information did not specify the quantity of these substances discharged or their effect on the waters of the Monongahela River. The information did not charge PICCO with pollution or with the deposit of materials deleterious to the river. It accused PICCO only of a discharge. It did not charge PICCO with any violation of either state or federal water quality standards, or of its permits for each of the discharge streams.

At the time of the trial the court refused to permit PICCO to show that its discharges were within the federal water quality standards applicable to the Monongahela River. It also refused to permit PICCO to offer evidence as to the effect of its discharges on the water of the Monongahela River. Although the court ruled that no discharge of any kind into the Monongahela River was lawful in the absence of a permit for such discharge issued by the United States Army Corps of Engineers, it refused to allow PICCO to show through witnesses and documents from the Corps of Engineers that the Corps had never granted a permit for a discharge such as that of PICCO from the date of the

**The second count included manganese in the list of elements.

enactment of the 1899 statute, and was neither prepared to process an application for nor to issue such a permit.

The case was sent to the jury with the instruction that any discharge from an industrial establishment, no matter how innocuous, was a violation of the criminal law of the United States, in the absence of a permit for it from the Corps of Engineers, regardless of whether the Corps of Engineers construed the statute to require such permits or was prepared to receive applications and issue permits. With such instructions regarding the statutory provisions, it came as little surprise that PICCO was convicted on all four counts. The district court judge imposed the maximum permissible fine.

PICCO then appealed to the United States Court of Appeals for the Third Circuit. That Court reversed. It held in effect that if the statute prohibited *all* discharges in the absence of a permit, then it was incumbent upon the Government to furnish a mechanism by which a responsible entity seeking to discharge an acceptable effluent into a waterway could obtain a permit, and that unless a mechanism existed by which PICCO could have obtained a permit for its discharge, the Government could not prosecute it under the 1899 Act. In the alternative, the Court of Appeals said that PICCO should have the opportunity to prove that it had been led to believe by the official regulations and by statements of responsible representatives of the Corps that no permit was necessary for the type of discharge which PICCO made.

INTEREST OF THE AMICI CURIAE

Criminal informations were filed against United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation in the United States District Court for the Western District of Pennsylvania on the same day as the criminal information involved in this matter was filed against PICCO. The informations involve discharges of substances with no tendency adversely to affect navigation in the summer of 1970 prior to the existence of a permit program for such discharges. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation moved to dismiss the informations filed against them. Following argument on the motions to dismiss, the District Court entered an order deferring decision of the motions to dismiss until the decision of the Third Circuit Court of Appeals in this matter. No decision has yet been entered on the motions to dismiss and the amici are advised that no decision will be entered pending the resolution of the present matter by this Court. United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation believe the disposition of the informations filed against them is likely to be controlled by the action of this Court in the present matter. Therefore, they have obtained the consent of the Solicitor General and counsel for PICCO to file this brief as amici curiae.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly held that PICCO could not be prosecuted for the failure to hold a permit for the discharge into the Monongahela River in the summer of 1970 of treated process and cooling water with no tendency adversely to affect navigation if no mechanism existed by which PICCO could obtain a permit for such a discharge. This conclusion was sound because until December 23, 1970 when the President by Executive Order No. 11574 directed the creation of a permit program under § 13 of the Rivers and Harbors Act of 1899 for discharges such as that made by PICCO, reasonable men relying on the text, the legislative history, the judicial construction, and the administrative practice followed with regard to § 13, would not have believed that a permit was needed or was available for such a discharge.

If § 13 is regarded as prohibiting a discharge such as that made by PICCO, it is in conflict with the Federal Water Pollution Control Act, as amended, which at the time of the discharges involved in this matter permitted such discharges if they met water quality standards. The situation called for a judicial accommodation of the statutes. The Court of Appeals correctly reconciled this conflict by holding that prosecution for discharge was not permitted under Section 13 unless a mechanism existed by which those meeting water quality standards set pursuant to the Federal Water Pollution Control Act, as amended, could apply for and obtain permits.

The conviction of PICCO on the facts of the present case denied it due process of law because of the confus-

ing and conflicting demands of § 13 and the Federal Water Pollution Control Act, as amended and because of the misleading conduct of the Corps of Engineers with regard to the scope of Section 13.

The writ of certiorari should be dismissed as improvidently granted because the *PICCO* decision is without prospective effect, especially in light of the Federal Water Pollution Control Act Amendments of 1972 and because its correctness is confirmed by those amendments.

ARGUMENT

I. The Court of Appeals Correctly Held That Picco Could Not Be Prosecuted for Failure to Possess a Permit for Discharge Under Section 13 for It's Discharge Into the Monongahela River if no Mechanism Existed at the Time of the Discharge Through Which Picco Could Have Obtained a Permit.

The brief of the United States in this case represents an effort to persuade this Court to judge the conduct of PICCO in the summer of 1970 by standards first articulated by the Government in December, 1970. This effort must be patently offensive to reasonable men and the Court of Appeals quite properly rejected it. The Court of Appeals for the Third Circuit told the Government that it could not assess criminal penalties against PICCO for the failure to have a permit for the discharge into the Monongahela River of material with no tendency adversely to affect navigation if no mechanism existed by which PICCO could obtain a permit for such discharge. This proposition seems so obviously sound that one may wonder why it was necessary for the Court of Appeals to declare it. It seems a puzzle that the United States should prosecute a business entity, which held appropriate state permits incorporating both state and federal water quality standards for its discharge of treated waste-water and which was in the process of constructing upgraded treatment facilities, for failure to obtain a non-existing permit. It further seems anomalous that the Government at trial should have prevented representatives of the Corps of Engineers from giving testimony as witnesses on behalf of PICCO that the Corps had not given permits for dis-

charges such as that of PICCO and did not have administrative machinery to deal with applications for such permits. In order to understand why in the summer of 1970 PICCO and the Corps of Engineers shared an understanding of what Section 13 required which is so at variance with what the United States now contends for in its brief, it is necessary to examine the enactment, interpretation and administration of Section 13 prior to the Executive Order No. 11574 of December 23, 1970.

A. THE HISTORICAL BACKGROUND OF SECTION 13 CLEARLY INDICATED THAT IT WAS ADDRESSED TO PROTECTION OF NAVIGATION.

The history of legislation dealing with placing materials in the navigable waters of the United States began in 1877 when the Secretary of War sent to Congress a proposal drafted by the Chief of the Army Engineers to protect navigable waterways from obstruction. The draft was placed in the form of a bill, called the "Dolph Bill," and was introduced without result into Congress several times between 1877 and 1890. In the latter year, at the time Congress was considering the Rivers and Harbors Appropriation Bill of 1890, the Dolph Bill was added to the Appropriation Bill as an amendment and finally enacted on September 19, 1890 (26 Stat. 426; Act of September 19, 1890; c. 907). Section 6 of this Act (set out in full in Appendix "A" to this Brief) was clearly addressed to regulation of discharges with a tendency to obstruct navigation. The United States has never made a contention to the contrary.

In 1894, a similar section was added to the River and Harbors Appropriation Act of 1894 (28 Stat. 363; Act of August 18, 1894, c. 299). This provision is also set out in full in Appendix "A" of this Brief. It was patterned after a section of an earlier statute (Act of June 29, 1888, c. 496, § 1) which concerned only New York harbor and which can today be found at 33 U.S.C. § 441. The only exchange during the discussion of the bill which touched on the purpose of their provision showed clearly that it was addressed to discharges which might affect navigation. (See Appendix "B" to this Brief.)

In 1896 a group of mine operators applied to the Secretary of War for designation of an area of the New River in Virginia where they could dump ore washings without violating the 1894 Act. The Secretary determined that the discharge could be made in a way which would not affect the navigability of the river. However, because of opposition by parties contending that the discharge ". . . destroys the fish, pollutes the water so as to destroy its usefulness for domestic purposes, and injuries scenery along the stream . . . ," the Secretary asked the Attorney General whether he should consider matters other than the effect on navigation. The Attorney General replied:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been

made in the improvement of the river." (21 Op. Atty. Gen. 305, 308 (1896)).

In summary, it is clear that at the time of their enactment, the Acts of 1890 and 1894 were understood to be addressed only to the protection of navigation and not concerned with a discharge such as that made by PICCO consisting of dissolved material with no tendency adversely to affect navigation.

Because the provisions of the Acts of 1890 and 1894 considered above, as well as other provisions not relevant here, were scattered over many annual rivers and harbors appropriation bills, Congress in 1896 directed the Secretary of War (29 Stat. 234) to collect all federal statutes dealing with navigable waterways and to compile a draft statute which would incorporate all existing federal law on the subject. On February 10, 1897, the Secretary of War forwarded to Congress a compilation of existing statutes and a draft composed by the Chief of Engineers of a statute which purported to state the existing law (H. R. Doc. No. 293, 54th Cong., 2d Sess., 1896-97).

The Chief of the Corps of Engineers, in his report to the Secretary of the Army, referred specifically to Section 6 of the Act of 1890 and Section 6 of the Act of 1894, and then proposed what became § 13 of the Rivers and Harbors Act of 1899 in the exact form in which it now appears. When the draft of the Chief of Engineers was offered in Congress as a codification of existing law, the principal concern was that it be an accurate restatement of the existing statutes. See 32 Cong. Rec. 2296, 2297. That § 13 was intended to be a codification of § 6 of the Act of 1890 and § 6 of the Act of 1894 —

and nothing more — is a proposition that has never been questioned. And if one traces § 13 back to its origins in the Acts of 1890 and 1894, it is clear that the legislative intention was to regulate discharges obstructing or interfering with navigation.

This intention and understanding are strongly confirmed by a piece of subsequent legislation, Section 4 of the Rivers and Harbors Act of 1905, 33 U.S.C. § 419. This provision is expressly limited to conferring authority to prescribe regulations on the deposit of refuse in order to protect navigation. Section 4 began life as an amendment to Section 13 of the 1899 Act, and it is most clear that at all times it was understood as an implementation of § 13 to aid in enforcement. A reading of the discussion of § 4 at 39 Cong. Rec. 3230 (58th Cong., 3d Sess., Feb. 23, 1905), leaves no doubt that § 13 was understood to be concerned with the protection of navigation.

In summary, so far as the legislative history of § 13 is concerned, both the Corps of Engineers and PICCO were on sound ground in supposing that the statute had no application to discharges such as that made by PICCO and did not require the Corps to equip itself to issue permits for such discharges.*

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*Comment, "Discharging New Wine Into Old Wineskins: The Metamorphosis Of The Rivers And Harbors Act Of 1899," (Hereinafter "Discharging New Wine") 33 U. Pitt. L. Rev. 483, 494-507 (1972).

B. AT THE RELEVANT TIME, THERE WAS NO WELL-CONSIDERED APPELLATE COURT INTERPRETATION OF SECTION 13 WHICH ENLARGED ITS LANGUAGE TO INCLUDE THE REGULATION OF DISCHARGES NOT HAVING AN EFFECT ON NAVIGATION.

The view that § 13 has been or may be interpreted to prohibit discharges not having a navigational effect is often supposed to be supported by the decision of this Court in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), and that case is carelessly cited as holding that § 13 is a "pollution" statute in the modern sense, see, *e.g.*, *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971). In fact, *Standard Oil* held no such thing. As stated on page 5 of the brief filed on behalf of the United States in this Court in *Standard Oil*, "the only issue . . . was whether something which has not been discarded or rejected by its owner can constitute 'refuse matter.'" The argument of Standard Oil as appellant was that because the discharge consisted of commercially valuable gasoline, it could not be considered "refuse" under Section 13. This Court held that whether matter was "refuse" did not turn on a factual determination as to its value. Although Justice Douglas commented at 384 U.S. 229 on the unpresented issue of the application of § 13 to substances with no capacity adversely to affect navigation, the determination of *Standard Oil* that "refuse" could include substances which had a high commercial value before being thrown into the water did not resolve the issue.

In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), decided six years before *Standard Oil*, *supra*, this Court dealt with the "streets and sewers" exception of Section 13. There the United States sought

an injunction to require the defendant and other manufacturers to remove solids which they had deposited in the Calumet River over a period of years and to restore the channel to a depth of 21 feet. The lower courts denied the relief.

The United States, in its petition for *certiorari* characterized the question involved as: "Whether the discharge of industrial waste from steel mills into the Calumet River, a navigable waterway of the United States, resulting in a reduction of the navigable capacity of the channel and providing a serious hazard to ships using it, is prohibited by federal law." The defendants contended that their discharges of particles in suspension fell within the exception of § 13 for materials passing from sewers in a liquid state. This Court rejected that contention.

Neither *Republic Steel* nor *Standard* Oil were holdings that § 13 regulates discharges with no tendency adversely to affect navigation.

Prior to the recent prosecutions brought under § 13, only a few reported decisions had dealt with the issue whether it applied to materials with no tendency adversely to affect navigation. In *Nicroli v. Den Norske Afrika-Og Australielinie Dampskibs Aktieselskab*, 332 F.2d 651 (2d Cir. 1964), the defendant argued that § 13 and § 1 of the Act of 1888, concerned with New York harbor, 33 U.S.C. § 441, prevented a shipowner from hosing spilled sugar from the deck of a ship into New York harbor. The Second Circuit examined the statutes and concluded at page 655:

> "Though the statutory language is broad, the purpose of these statutes is to prevent the dis-

charge of matter *which will clog or obstruct the harbor or other navigable waters.*" (Emphasis added)

Warner Quinlan Co. v. United States, 273 Fed. 503 (3rd Cir. 1921), was a case brought under the provisions of 33 U.S.C. § 441, which, as has previously been noted, is closely related to § 13. The court there concluded that: "Deposits which do not obstruct or injuriously affect the harbor are not prohibited by the Act."

At page 16 of its brief before this Court, the Government argues that courts of appeals early declined to limit Section 13 to a prohibition of discharges with a tendency to obstruct navigation. As the cases cited above show, this is not an accurate statement of historical fact. Moreover, an examination of several of the cases cited by the Government shows that they fail to support its position.

For example, in *Maier v. Publicker Commercial Alcohol Co.,* 62 F. Supp. 14 (E. D. Pa. 1945), *aff'd.,* 154 F.2d 1020 (1946), cited at page 16 of the Government's brief, the alleged violation of § 13 was the deposit through a city sewer into the Delaware River of some 9,190 tons of non-soluble grain residue and over 21,000 tons of grain residue in solution or suspension with the effect of filling the channel at one point to two feet above water level at low tide. Obviously, the court had no occasion to consider the application of § 13 to discharges with no tendency adversely to affect navigation.

United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952), involved the dumping of 6,700 barrels of fuel oil into a navigable waterway. The lower court as trier

of fact found that the oil which had been an inch thick on the water and covered boats had the nature and effect of impeding navigation. The defendant seized upon the conclusion of the district court that the oil impeded navigation and contended that this finding indicated its conviction must have been based on the provision of § 13 which is addressed to the placing of refuse on river banks, and that since the evidence showed no deposit of refuse on a river bank, the conviction could not stand. The real issue was whether reference by the trial court to the navigational effect of the discharge necessarily required the conclusion that the conviction had been under a limited portion of § 13, with the consequence that unless the discharge had been shown to be from a river bank, the conviction was erroneous. The answer, of course, was obvious — a navigation-obstructing discharge could be charged under § 13 regardless of whether the material was deposited on a bank or directly in the water. No one before the court argued that, or was concerned with the issue whether, the first part of § 13 was addressed *only* to materials with a tendency adversely to affect navigation and the holding of the court did not resolve the issue. It is worthy of emphasis that the same court in the later *Nicroli* case, *supra,* concluded that § 13 was *not* addressed to a discharge with no tendency adversely to affect navigation.

La Merced, 84 F.2d 444 (9th Cir. 1936), does say that the first clause of § 13 does not require that a discharge have a tendency to obstruct navigation in order to be refuse but the facts of the case *place* it in much the same category as *Ballard* and other oil spill cases. In holding that oil was "refuse" within the meaning of

§ 13, the Ninth Circuit relied upon two cases decided under the Act of 1888, dealing with New York harbor, *The Columbo,* 42 F.2d 211 (2d Cir. 1930), and *The Albania,* 30 F.2d 727 (S. D. N. Y. 1928), both of which stated that oil was in fact a danger to the use of a harbor for shipping.

In summary, the decisional law in the summer of 1970, taken as a whole and in the context of the factual situations before the several courts, gave no reason to the Corps of Engineers or PICCO to question the understanding that § 13 did not apply to a discharge such as that made by PICCO.

C. THE VARIOUS ARGUMENTS THAT HAVE BEEN ADVANCED SINCE 1970 TO SUPPORT THE PROPOSITION THAT § 13 IS ADDRESSED TO DISCHARGES WITH NO TENDENCY ADVERSELY TO AFFECT NAVIGATION ARE SPECIOUS AND WOULD NOT HAVE CAUSED A REASONABLE MAN TO ACCEPT THAT INTERPRETATION.

Since the Government launched its 1899 Act "pollution" prosecution program, it has made a valiant effort to bolster the conclusion that § 13 is addressed to discharges with no tendency adversely to affect navigation by a variety of arguments based upon deductions from provisions in the text of § 13 concerning other subjects. One such argument is that the provision of § 13 allowing the Chief of Engineers to issue permits for discharges on a finding that anchorage and navigation will not be impaired would not have meaning unless § 13 covers materials which would not impair anchorage or navigation. This argument ignores the practical administration of the 1899 Act. For example, a permit might allow the discharge of industrial solids on the condition that the channel be dredged periodically by the discharger in order to prevent actual interference with navigation or it might authorize discharge in an area outside the channel of navigation. Indeed, these examples are typical of the practice of the Corps of Engineers in 1970 and for 70 years before in connection with permits under other provisions of the 1899 Act than § 13.

Another such argument is the contention that the exception in § 13 for materials "flowing from streets and sewers and passing therefrom in a liquid state" shows that § 13 was addressed to liquid materials with no tendency adversely to affect navigation. The un-

stated premise in this argument — that material flowing from municipal streets and sewers in 1899 did not have a tendency to obstruct navigation — is shown to be of dubious validity by a report of the Rivers and Harbors Committee of the House some years later which observed:

> "In some instances the organic solid matter in sewage and wastes causes temporary shoaling in the vicinity of the point of discharge, but in most cases of this kind, nature eventually decomposes the organic matter and rectifies the condition. In a few instances, where large quantities of sewage are discharged into sluggish and restricted waters, over-pollution results and the oxygen content remains insufficient to enable nature to break up the solids. In such cases, permanent shoaling in the vicinity of the point of discharge results and dredging must be restored to. As a rule, dredging is well attended to by municipal authorities."*

Sewage was a physical threat to navigation if dumped in large masses into the waterways. The municipal corporations were permitted to continue their former practices of discharing into the water, providing the discharges were liquid enough to encourage the natural degradation and biological self-disposal of human wastes to occur. Thus, one aware of the facts concerning the disposal of municipal sewage, as the Corps undoubtedly was and is, would not have been led to the conclusion that § 13 was addressed to discharges with no tendency adversely to affect navigation.

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*H. R. Doc. No. 417, 69th Cong., 1st Sess. 9 (1926)

D. THE LONG-ESTABLISHED ADMINISTRATIVE INTERPRETATION OF SECTION 13 AT THE TIME OF THE DISCHARGES INVOLVED IN THIS CASE WAS THAT IT ONLY REGULATED DISCHARGES WITH A TENDENCY ADVERSELY TO AFFECT NAVIGATION.

Until the recent change of position by the United States with respect to Section 13, it is obvious from the published regulations of the Corps of Engineers that it understood § 13 to be addressed to discharges with a tendency adversely to affect navigation.

The United States concedes with exquisite reluctance at page 35 of its brief "that in defining its responsibilities under the 1899 statute as 'directed . . . principally against the discharge of those materials that are obstructive or injurious to navigation' (33 C.F.R. (1967 ed.) 209.395), the agency for many years viewed its role narrowly." While not literally a half-truth, or a malicious misstatement, it is hardly a candid acknowledgement of a fact which the hapless defendant in this case was denied any reasonable opportunity to prove — that neither the Corps of Engineers, nor the Department of Justice, nor thousands of reputable, law-abiding industries discharging various types of "used" water into streams had any idea that the Corps of Engineers had the power or the responsibility under the 1899 Act to act with reference to discharges having no potential for adversely affecting navigation.

The United States argues, however, that a revision of the regulations published in 1968 represented a clear change in position by the Corps of Engineers. In fact, the revisions represented no such thing.

The only mention of § 13 in the revised regulations was as follows:

Title 33 C.F.R., Section 209.200(e):

"(2) Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. § 407) authorizes the secretary of the army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the chief of engineers anchorage and navigation will not be injured thereby, within limits and under conditions to be prescribed by him. Although the department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the Rivers and Harbors Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. § 419). As a means of assisting the chief of engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District."

Section 4 of the Rivers and Harbors Act of March 3, 1905, 33 U.S.C. § 419, as noted above, authorized the Secretary of the Army to prescribe regulations to govern the transportation and dumping into any navigable water of dredgings, earth, garbage, and other refuse matter of every kind whenever in his judgment such regulations are required *"in the interest of navigation."* (Emphasis added) The regulations of the Corps of Engineers until the issuance of new regulations regarding § 13 on April 7, 1971, consistently demonstrated that it regarded § 13 and 33 U.S.C. § 419 as virtually identical provisions to the extent that they provided that the preferred practice was to treat applications for permits under § 13 as applications under § 419.

Moreover the Corps of Engineers had issued an internal regulation concerning permits for discharge promulgated May 18, 1968, ER 1145-2-303, which states, inter alia, in 7(d):

> "The concern of the Department of the Army in industrial wastes under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on the navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for removing these shoals on those industries that are causing them."

The United States now argues that PICCO should have disregarded this long-established position of the Corps of Engineers because of a change of policy that took place some time subsequent to 1968.

As we have noted, Section 209.200(e)(2) of the regulations was the only section which referred explicitly to § 13 at the time the alleged violation of PICCO took place. 33 C.F.R. 209.120(d)(1), on which the Government relies, did *not* cite § 13. It is true that this provision states "the decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest . . . ."

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*The position of the Corps of Engineers in this regard was fully justified, for the legislative history of 33 U.S.C. § 419, found at 39 Cong. Rec. 3230 (58th Cong., 3d Sess., Feb. 23, 1905), makes clear that § 419 was intended to provide for the implementation of § 13.

However, the inventory of "principal laws" administered by the Corps in § 209.120(b) did not include § 13. An announcement that "pollution, aesthetics, ecology and the general public interest" will be considered in connection with an application to the Corps for permission to dredge and fill in the navigable waters is not the equivalent of a statement that henceforth a permit will be required for an activity which has no effect on navigation.

It is also true that the memorandum of understanding dated June 13, 1967 between the Secretary of the Interior and the Secretary of the Army does refer to pollution problems which may arise from discharges permitted under the 1899 Act. However, since discharges with a tendency adversely to affect navigation may well have a pollutional effect, this reference to pollution does not prove that the Corps of Engineers had suddenly decided that § 13 was addressed to all discharges. Obviously the memorandum of understanding did not inhibit the Corps from promulgating its later internal regulations, ER 1145-2-303, the 1968 regulation referred to above, which indicated its concern was with suspended solids and navigation.

In the appendix to its brief, the United States cites press releases by the Corps of Engineers at Washington dated May 19, 1970 and July 30, 1970, apparently as support for the proposition that the Corps had changed its interpretation of § 13 and then and thereafter required permits for discharges such as that made by PICCO. It is by no means clear that these documents bear this interpretation. Moreover, the Government at no time offered evidence of the existence of these press releases, or of their publications, or that PICCO or any-

one else in Western Pennsylvania had actual knowledge of them. There is a serious question as to whether it is proper to charge a criminal defendant with constructive knowledge of material contained in a press release of unknown distribution and publication rather than in the *Federal Register, Hotch v. United States,* 212 F.2d 280 (9th Cir. 1954).

In summary, both PICCO and the Corps of Engineers at the time of the alleged criminal violations in this case had a well-founded belief that Section 13 had no application to a discharge with no tendency adversely to affect navigation and that therefore, no permit under § 13 was necessary for such a discharge. As a result, in the case of Section 13, conspicuously unlike related statutory provisions administered by the Corps, for example, 33 U.S.C. § 403, there was no permit program, no form of application, no form of permit, no administrative apparatus.

The Court of Appeals, even though willing to accept the "modern," post-1970 contention that § 13 has application to a discharge such as that of PICCO, was not willing to accept the irrational, absolutist position that the principal function of § 13 is to stand as a total bar to any and all discharges. Rather, it concluded that the object of § 13 is to permit discharges under controlled circumstances — that inherent in that objective is the requirement of a permit program — and that in the absence of the permit program which is an integral part of the statutory scheme, Congress did not intend criminal penalties to be assessed for the failure to possess a permit. Putting it another way, the Third Circuit reached the sensible conclusion that, even if the 1899 Act was capable of the interpretation of being more than

a statute to prevent obstruction to navigation, the crime Congress intended to create was that of making such a discharge without a permit, not of making *any* discharge —since "any discharge" is too vague a standard to be accepted as the measure of a crime.

II. The Construction of § 13 by the Court of Appeals Properly Resolved the Conflict Between § 13 and the Modern Federal Water Quality Legislation as It Existed at the Time of the Events Involved in This Matter.

It is obvious that if § 13 is read as being applicable to a discharge such as that of PICCO, then a conflict exists between the 1899 Act and modern federal legislation dealing specifically with water pollution as it existed prior to October 18, 1972.* In order to appreciate the resolution of the conflict by the Court of Appeals, it is first necessary to review the statutory provisions involved to understand the nature and extent of the contradiction.

The history of the federal water pollution legislation can be set forth succinctly. It originated in 1948 with the Water Pollution Control Act, 62 Stat. 1155. This Act charged the Surgeon General of the United States with the task of dealing with the problem of

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*E.g., W. Rodgers, "Industrial Water Pollution And The Refuse Act: A Second Chance For Water Quality," 119 U. Pa. L. Rev. 761, 820 (1971): ". . . the new procedures [referring to the 1971 permit program under the 1899 Act] represented a repudiation of the 1965 program as thoroughly as that year's enactment ignored the underlying philosophy of the 1899 Refuse Act."

water pollution. Although the Act did contain a provision whereby the Attorney General, within certain limitations, could bring an action to abate pollution, the Act contained no definitions or standards of what constituted "pollution" and was generally unenforced and unenforceable. Section 24 of the Water Pollution Control Act of 1948 expressly stated that Sections 13 through 17 of the Rivers and Harbors Act were not affected by its enactment. The Water Pollution Control Act Amendments of 1956, 70 Stat. 498, expanded the powers of the Surgeon General and specifically provided in Section 8(c) that in cooperation with state authorities he could convene conferences to deal with specific pollution problems, could provide state authorities with the results of such conferences, and could recommend that state action be taken to abate nuisances. Section 8(b) of the 1965 Amendments provided:

> "Consistent with the policy declaration of this chapter, state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this subsection, *be displaced by federal enforcement action.*" (Emphasis added)

The avowed policy of the Water Pollution Control Act, after amendment in 1956, was thus to make abatement of pollution problems primarily a state concern. The 1956 amendments reenacted in Section 12 the provision of the original Water Pollution Control Act saving the effectiveness of the 1899 Rivers and Harbors Act, Sections 13 through 17. Neither the legislative history of the Water Pollution Control Act of 1948 nor that of the 1956 amendments elucidates in what manner Congress

envisioned the 1899 Rivers and Harbors Act and the Water Pollution Control Act would interact. However, it is clear from the reported cases that enforcement of § 13 had historically involved two types of cases — accidental discharges of oil and discharges of industrial solids, both of which genuinely interferred with the navigable use of waters. The reported cases show that this pattern of the use of § 13 remained true into the year 1970. There is nothing surprising in the decision of Congress not to allow its water pollution legislation to interfere with or impede the operation of § 13 in the circumstances in which it had been historically applied.

Water pollution control again received Congressional attention in 1961 and 1965. The Federal Water Pollution Control Act Amendments of 1961 empowered the Attorney General to bring actions in a federal district court without consent of a concerned state in any case in which the health of persons in a state other than that of the origin of the discharge was endangered, 75 Stat. 204, § 8(b). Actions where the effect of the discharge was limited to a single state could be brought with the consent of the governor of that state. In 1965 the Water Quality Act, 79 Stat. 903, amending the Water Pollution Control Act, effected a comprehensive revision of the federal water pollution legislation. For the first time, provisions for establishing standards were enacted as Section 5(c)(1). As provided in the 1965 Act, states which set standards for water quality which were acceptable to federal authorities in effect established the standards applicable in abatement actions in federal courts under the Water Pollution Control Act, because those "state" standards also became "federal" standards by virtue of the approval.

The then existing provision of the Water Pollution Control Act which "saved" the 1899 Rivers and Harbors Act was untouched by these amendments. No mention of this saving provision was made either in the text or legislative history of the 1961 amendments or the Water Quality Act of 1965. Section 107 of the Water and Environmental Quality Improvement Act of 1970, 84 Stat. 91, deleted a reference to the Oil Pollution Act of 1924, (which had been repealed by the 1970 Act) from the "savings" of the Water Pollution Control Act, but again there is no legislative history to suggest that the failure to change the language in the same savings clause as to the 1899 Act had any significance. There was certainly no affirmative indication of Congressional purpose with regard to coordination between the 1899 Rivers and Harbors Act and the Water Pollution Control Act.

The Government's argument at pages 20 and 21 of its brief that § 13 was "saved" because it provided an alternative enforcement procedure is contrived and unpersuasive. A more obvious and plausible rationale for the inclusion in the savings clause of the 1899 Act can be found in the fact that at the times when the savings clause was first drafted in 1948 (and at all times when it was subsequently reenacted)* it was generally understood (and presumably therefore, also by Congress) that § 13 was addressed to materials with a tendency adversely to affect navigation. Although all discharges which might be thought to pollute in the modern sense do not have a tendency adversely to affect navigation, many matterials with a tendency adversely to affect naviggation, *are* pollutants. It is only logical that Congress, in dealing

*Comment, "Discharging New Wine," supra, 33 U. Pitt. L. Rev. 483 at 521, Note 154.

with substances covered by the modern legislation as pollutants, would not want to abolish the remedies previously constructed for dealing with these same substances when they tended to affect navigation. In this connection, it must be remembered that Congress consigned primary responsibility for dealing with water pollution to the states. One might well choose to delegate control over the discharge involved in *Republic Steel, supra,* for example, to the states insofar as it was a pollution problem but retain federal remedies for dealing with it if it interfered with navigation.

That there is a conflict between the two statutory schemes under the Government's view of the 1899 Act is easily demonstrated. The Water Pollution Control Act, as it stood at the time of the alleged offenses in this information, provided for establishment of federal water quality standards (principally through state action), 79 Stat. 903, § 5(c)(1), and empowered the Attorney General to seek abatement of discharges which failed to meet these standards. Of course, discharges which did meet the applicable water quality standards were not subject to abatement under any provision of the Water Pollution Control Act. By contrast, Section 13 dealt with discharges of an undefined subject matter called "refuse" into navigable waterways. Although Section 16, the enforcement provision for § 13, 33 U.S.C. § 411, does not explicitly provide for an injunctive remedy, case law has established that the Attorney General possessed the power to seek and obtain injunctions in § 13 cases, see e.g., *United States v. Republic Steel Corp., supra.*

The synthesis of this legislation by the Government is that in 1970 the Attorney General had the pow-

er to obtain an injunction under the Water Pollution Control Act as to discharges which did not meet the standards established under that Act and the power to obtain an injunction against discharges which *did* comply with the Water Pollution Control Act standards, simply by seeking relief under the 1899 Act and not mentioning the modern scheme of water pollution control under the Water Quality Act of 1965. The result is, of course, incongruous and intolerable.

This interpretation would give a prosecutor license to disregard the carefully formulated legislation of this era by invoking the primitive prohibitory language of a statute of the last century at his unfettered discretion. If the Government's contention as to the relationship of the two statutes is correct, the water quality standards of the 1965 Water Quality Act are meaningless. The point is illustrated by the circumstances of the instant case in which the United States obtained a criminal conviction of PICCO for violation of § 13 despite PICCO's offer to prove its compliance with the standards set pursuant to the 1965 Water Qualty Act.

The Court of Appeals properly refused to approve such a result. It did not permit the efforts of Congress in providing for water quality standards in the 1965 Water Quality Act to be rendered pointless by the use of the 1899 Rivers and Harbors Act, which at the time of its enactment and today contains no water quality standards. Likewise, this Court must surely recognize that improvement of water quality in the 1970's is a problem of adjusting the economically and technologically possible to the environmentally necessary; it is not a goal to be reached by distortion of an act of the

past century into an absolute prohibition of any discharge, an absolute prohibition which invites discriminatory application.

The issue which faces this Court is one of the accommodating or reconciling the 1899 Rivers and Harbors Act with the Water Quality Act. This accommodation does not require a decision that the enactment of the 1965 Act repealed by implication certain provisions of the 1899 Act and we do not so argue.* Accommoda-

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*Yet the question has often been incorrectly so characterized. For example, in *United States v. Interlake Steel Corporation*, 297 F. Supp. 912 (N. D. Ill. 1969), a lower court case much cited by other lower courts in the Seventh Circuit, the information charged Interlake Steel Corporation, a codefendant in the earlier *Republic Steel* case, with discharging iron particles (mill scale) and an oily substance into the Little Calumet River. The defendant moved to dismiss the information. At page 916 of its opinion, the court dealt with the problem of the apparent conflict between the statutes. It characterized the defendant's argument as one that "Section 13 of the Rivers and Harbors Act is superseded and modified by the Water Quality Act of 1965" and "the Supreme Court's decision in *United States v. Republic Steel Corp., supra*, which held that a discharge into the Little Calumet River similar to the one alleged in the instant information violated the Rivers and Harbors Act cannot stand in light of the Water Quality Act." The court rejected that argument on three grounds. The first was the saving clause for the Rivers and Harbors Act in the Water Quality Act of 1965. The second was that the Water Quality Act of 1965 was intended to upgrade water standards. The third was that the discharges probably violated water quality standards in any event.

Interlake is clearly distinguishable from the instant case in the scope of the question to be considered. The amici here do not argue that the Water Quality Act of 1965 superseded the Rivers and Harbors Act of 1899

tion does involve coming to grips with the fact that criminal prosecution of a person for allegedly discharging "refuse" under 1899 Act, regardless of that person's compliance with the 1965 Water Quality Act, most dubiously serves the purpose of Congress in trying to resolve the difficult problem of water pollution in the United States. Specifically, accommodation in the present context requires the conclusion that before PICCO could be prosecuted under § 13, it should have had the opportunity to obtain a permit under § 13 on a showing that its discharge compiled with the standards set pursuant to the 1965 Water Quality Act. It is not presumptuous to suggest that this apparently was what President Nixon contemplated would be the practical

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or overruled *Republic Steel, supra*. Our argument is that the statutes must be accommodated so that they further rather than frustrate the intent of Congress.

We submit that the Illinois court *was* in error when it reasoned that the Water Quality Act of 1965 was intended only to secure higher water quality standards than the Refuse Act and therefore an accommodation of the two acts was not necessary or desirable to ameliorate the absolute prohibition of the Rivers and Harbors Act. If the Rivers and Harbors Act is an absolute prohibition of all discharges then the purpose of the enactment of the Water Quality Act is difficult to perceive. Obviously, however, the purpose of the latter act is to set standards for industrial discharge which recognize the reality that industrial use of water within defined limits established by such standards is vital and on the public interest, yet protect the quality of the nation's waterways.

Of course, the result in *Interlake* might have been correct on the ground that the discharge involved was similar to the discharge in the *Republic Steel* case and therefore was a hazard to navigation.

manner of operation of the 1899 permit program, had it ever been carried out, according to his executive message.

It is no answer to the problem of statutory accommodation outlined above to say that the meaning of the words in the savings clause as to the 1899 Act of the Water Pollution Control Act is "clear" and therefore they permit no interpretation. As Mr. Justice Frankfurter observed: "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words." "Some Reflection On The Reading Of Statutes," 47 Colum. L. Rev. 527, 528 (1947). It is the function of the courts to give effect to the purpose of legislation and to develop statutory meaning rationally. Where two statutes appear to conflict in purpose and product absurd results if applied in a literal and narrow manner, it is an abnegation of the judicial function to observe that it is for the legislature to resolve the conflict and abandon the field. In the words of one authority:

> "To assume that accommodation or reconciliation of apparently conflicting statutes is work only for the legislature is to ignore the dynamics of legislative process. The problem, as it comes to the court, may have been unforeseeable at the time of legislative deliberation . . . Judicial accommodation can be accomplished only by ascertaining the purpose of each statute through an examination of the language, history and judicial gloss that has been placed on each." Wellington and Albert, "Statutory Interpretation And The Political Pro-

cess: A Comment On Sinclair v. Atkinson," 72 Yale L. J. 1547, 1551 (1963) (Footnote omitted)

This Court has very recently demonstrated the proper judicial role in preventing multiple statutes dealing with the same subject matter from producing an anomalous result in *Boys Market, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970). There the Court was faced with two flatly contradictory statutes: the provision of the Norris-LaGuardia Act, 29 U.S.C. § 104 which provides that the courts of the United States lack jurisdiction to issue injunctions in cases involving labor disputes, and the command of § 301 of the Labor Management Act, 29 U.S.C. § 185(a) which directs federal courts to take jurisdiction of cases involving labor disputes.

A pattern had developed involving the no-strike provision frequently found in collective bargaining agreements containing an arbitration clause. If a union struck in defiance of its promise to arbitrate, the employer would bring an action in a state court, seeking an injunction against the strike, and enforcement of the agreement to arbitrate. The injunctive remedy was available in many state courts. The union would remove under 29 U.S.C. § 185(a) to the nearest federal court, and the federal court, following the *literal* dictates of the Norris-LaGuardia Act, would refuse to enjoin the strike. The result was complete frustration of a Congressional purpose to resolve labor disputes peacefully.

While the two conflicting statutory provisions did not expressly refer one to the other, it was not possible to argue that the later-enacted provisions of the Labor

Management Relations Act had repealed the Norris-LaGuardia Act nor was that argument offered. The Court observed at 398 U.S. 250:

> "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions [. . . citations]
>
> The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today."

Unwilling to frustrate the Congressional purposes of peaceful settlement of labor disputes by a literal reading of the quite clear language of the Norris-LaGuardia Act that federal courts were not to grant injunctions in labor disputes, this Court concluded, ". . . that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy" (of resolving labor disputes peacefully.) 398 U.S. at 253.

The present case presents the same sort of conflict for judicial resolution. In the summer of 1970, it was the evident policy of Congress to establish control of water quality by a process of definition of the problem, erection of standards, discussion with concerned industries in conference and before hearing boards, and finally abatement as a last resort where compliance

was not achieved through other than legal action. It was a policy in which states were to play the primary role. Where a corporation was in compliance with both state and federal standards, and was proceeding on a schedule to improve pollution control equipment as was PICCO in the instant case, no proper purpose was served by a criminal prosecution of it under the 1899 Act. This Court should affirm the conclusion of the Court of Appeals that the prosecution of PICCO on the facts of the present case was not desired or even contemplated by the Congresses which passed Section 13 or the several modern water pollution control statutes.

In this connection it is significant that the comprehensive Water Quality Act Amendments of 1972 spell out a procedure with regard to Section 13, and permits, which is most similar to the result of the decision of the Court of Appeals and manifestly reflects the policy consideration argued in this brief.

III. The Conviction of Picco Under the Information Involved in This Matter Constituted a Denial of Due Process of Law Because of the Confusing and Misleading Actions of the United States with Regard to Water Quality Standards and the Scope of Section 13.

The due process clause of the Fifth Amendment measures statutory provisions which define certain conduct as criminal. To square with its requirements, a statute must convey adequate warning to men of reasonable intelligence; it must not be so indefinite or contradictory that one who would obey the law must necessarily guess at what is and is not prescribed. ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (Footnote omitted). This proposition has been recognized in such other cases as *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), *Champlin Rfg. Co. v. Corporation Commission*, 286 U.S. 210, 243 (1932), and *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

A criminal statute should not be read in isolation. Statutes which refer to the criminal provision under which the charge is framed or deal with the same subject matter must be considered as well in testing the statute for compliance with demands of due process. In

Schact v. United States, 398 U.S. 58 (1970), this Court pointed out that the validity of the narrow statutory provision under which the indictment had been framed had to be considered in light of other pertinent statutory provisions:

> "Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. [Citation] . . . . But the general prohibition of 18 U.S.C. § 703 cannot always stand alone in view of 10 U.S.C. § 772, which authorizes the wearing of military uniforms under certain conditions . . ." 38 U.S. 58, 61 (1970).

In *International Harvester Co. of America v. Kentucky,* 234 U.S. 216 (1914), the Court examined three separate statutes and the state constitution to determine the applicable principles of law.

The provisions of § 13 likewise cannot be read in isolation, but instead must be tested in the context of other laws applicable to discharges into navigable water, specifically the Water Quality Act of 1965, amending the Water Pollution Control Act of 1948. *Schact* and *International Harvester* are an ample answer to the argument that a statute cannot be rendered unconstitutional by the effect of other legislation dealing with the same subject matter.

As noted above, the Water Quality Act of 1965 provided that states might establish water quality standards which, when approved by federal authorities, would become federal standards. In the case of the Monongahela River, the standards set by the Common-

wealth of Pennsylvania were accepted as the federal standards in 1967. 40 C.F.R., Ch. I, part 120.10. Discharges which fell outside the established standards were subject to abatement under § 5 of the Water Quality Act of 1965 and § 8(f) of the Federal Water Pollution Control Act Amendments of 1961. Procedures for notification of violation, for holding a conference before a hearing board and for reviewing applicable water quality standards are set out as preliminary steps in achieving compliance without resort to legal action by the Attorney General. Although the Water Pollution Control Act, as amended, did not explicitly so state, discharges which *did* comply with the water quality standards set pursuant to it were not subject to abatement under any of its provisions. This statutory framework is a realistic approach to a complex, important problem. Our industrial age has brought with it the discharge of by-products and waste materials into our waterways. The approach to the problem adopted by Congress in the Water Quality Act of 1965* was (a) to recognize that a certain amount of discharge is inevitable under the current state of technology and economy, (b) to define standards of water quality beyond which discharges are unlawful and hence subject to abatement as nuisances, and (c) to enforce these standards, all the while exploring the possibilities of improving the standards and lowering the amount of pollutants permitted in the necessary discharges. The implication of the Water Quality Act was that discharges which met or bettered the existing water quality standards were lawful, at least until the standards were raised.

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*And continued in the Federal Water Pollution Control Act Amendments of 1972.

On the other hand, § 13 purports to make discharge of "refuse" of any kind or matter not only unlawful and hence subject to abatement, but criminal as well.

As we have already pointed out, if § 13 is given the meaning which the Government argues for in the instant case, persons or corporations causing discharges of any kind into navigable waterways prior to the creation of the permit program in 1971 were criminally liable, despite the fact that the discharges were fully in compliance with the water quality standards of the Water Quality Act of 1965. The bizarre result would follow because the two statutes, combined into a single paragraph would read approximately as follows:

> "States have the primary responsibility for establishing water quality standards. Where states have established standards acceptable to the Administrator of the Environmental Protection Agency, those standards are federal standards as well. If, however, a state does not adopt standards, or adopts inadequate standards, then the Administrator of the Environmental Protection Agency may prescribe standards by regulation. All discharges which fail to meet the applicable standards of this section are nuisances and are subject to abatement by the Attorney General if compliance cannot be achieved by conciliation and negotiation before a hearing board. All discharges of refuse or matter of any kind into navigable waterways are criminal acts and are here condemned as misdemeanors, provided further that the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit discharges upon application to him."

What meaning does this composite statutory scheme convey to a man of common intelligence? The inconsistency is patent; discharges which meet applicable water quality standards are not nuisances and are not subject to even the civil remedy of injunction in abatement, and yet the same discharges are criminal and subject the actor to fines and imprisonment. A statutory scheme so inconsistent that a reasonable man does not know what is proscribed and what is approved violates the requirements of due process.*

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*Indeed, the Director of the Environmental Protection Agency has recognized this difficulty. In an Interview with William Ruckelshaus, published in the May, 1971 issue of *Environmental Science and Technology* under the caption, "A Candid Conversation With The First Administrator Of The Environmental Protection Agency," the following exchange took place at page 392:

[QUESTION]

"Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?"

[ANSWER BY MR. RUCKELSHAUS]

"The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 act, the people are to comply with the water quality standards; it says nothing about discharge into a stream being illegal.

"It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."

In *United States v. Evans,* 333 U.S. 483 (1948), this Court was faced with a federal criminal statute which was internally inconsistent. The defendant had one interpretation of the statute; the government had another. Both were possible and reasonable constructions of the wording of the statute. The straightforward approach of this Court was simply to refuse to apply the statute to the defendant. No mention of due process was made, the Court being of the view that it could not apply the statute if it did not know what it meant. It seems evident that the application of such a statute would be a clear violation of due process.

In *United States v. Cardiff,* 334 U.S. 174 (1952), the statutory provisions involved were found contradictory. There the majority observed:

> "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice." 344, U.S. 174, 176.

Other cases in which this Court has simply refused to apply a criminal statute for reasons of vagueness, indefiniteness or uncertainty include *Pierce v. United States,* 314 U.S. 306 (1941), *McBoyle v. United States,* 283 U.S. 25 (1931), and *United States v. Weitzel,* 246 U.S. 533 (1918).

That there was a conflict between the Water Quality Act of 1965, as amended, and § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 as the Government interprets it, is an irresistible conclusion. The former informed the would-be, law-abiding citizen that

"conduct X is approved if it meets certain standards." The latter informs the citizen that "conduct X is totally proscribed, on pains of criminal penalties." The result was an indefiniteness and confusion that is fatal under due process requirements.

Courts which have written decisions in recent prosecutions brought under § 13 have recognized the anomaly in such prosecutions. In *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971), the court observed at page 688:

> "The Court has great sympathy with the plight of an industry which, while endeavoring in good faith to comply with water quality standards approved by the Secretary of the Interior under the FWPCA, is subjected to criminal prosecution instituted by the Department of Justice under the Rivers and Harbors Act."

The court for the Northern District of Indiana in *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N. D. Ind. 1970), at page 358 stated:

> "The Court has considerable sympathy for defendant's position. The result *is* incongruous, and perhaps unjust." (Emphasis in original)

In its brief, the United States insinuates that PICCO was convicted in the District Court because it chose to "flout" the 1899 Act. A brief reflection demonstrates the fatuity of this contention. Entities like PICCO and the amici which have made substantial expenditures for water pollution control equipment in order to meet water quality standards and comply with state permit requirements and which obtain permits from the Corps of Engineers for construction in

the navigable waters in connection with their manufacturing establishments would hardly have failed to obtain § 13 permits for industrial waste discharges like those involved in the instant case had they been given reasonable notice that such permits were required. A reasonable man can only conclude that PICCO was prosecuted and convicted before the District Court because it was misled as to what was required of it.

This Court should recognize the anomaly in the instant prosecution and apply well settled principles of law to affirm the conclusion of the Court of Appeals that prosecution in these circumstances denies due process.

IV. The Affirmance by This Court of the Lower Court Holding Is Rendered Less Significant Generally by the 1972 Amendments to the Water Quality Act.

As we noted in our brief opposing the grant of certiorari in this case, the decision of the Court of Appeals would appear to be literally applicable only to discharges which took place prior to the institution of a permit program by the Corps of Engineers on April 7, 1971. In its petition for certiorari, the United States indicated that 115 criminal cases brought since 1970 remain pending; it does not indicate what fraction of those are affected by the *PICCO* decision. We submit that deep concern over the impact of the holding in this case on other Government prosecutions of those in the position of PICCO is neither justified, nor a proper judicial consideration.

This is particularly so because of the fact that on October 18, 1972 the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1251 et seq., (the "Amendments") became law. The Amendments have a significant effect on § 13. For example, 33 U.S.C.A. § 1342(a)(5) provides that no permit shall be issued under § 13 subsequent to October 18, 1972. It further provides that each application for a permit under § 13 pending on October 18, 1972 shall be deemed to be an application for a permit under § 1342. Section 1342(a)(1) provides that the Administrator of the Environmental Protection Agency may issue a permit for the discharge of pollutants upon a finding that the discharge will meet standards to be set pursuant to other provisions of the Amendments. Finally, Section 1342(k) provides that:

> "Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) [the Amendments] . . . or (2) [§ 13] . . ., unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

The Amendments make clear that the PICCO decision will neither affect present enforcement of the federal legislation designed to improve water quality nor present enforcement of § 13. The United States confirmed this in its Memorandum opposing the grant of the Petition for Certiorari in *T. W. Guthrie v. Alabama By-Products Co.*, No. 71-1672 in this Court, where it argued that:

> "The question whether riparian owners can sue under Section 13 of the Refuse Act for damages to their riparian interests is of limited importance in view of the recent enactment of the Federal Water Pollution Control Act Amendments of 1972."

The lack of future significance of the *PICCO* decision would be alone an appropriate reason for this Court to dismiss the writ of certiorari as improvidently granted. Moreover, the reconciliation of § 13 with the modern water quality legislation in the 1972 Amendments is so similar to that reached by the Third Circuit Court of Appeals as to confirm the correctness of its decision without the need for extended analysis.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the event the Court elects to reach the merits of this controversy, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

DAVID MCNEIL OLDS
JOHN MCN. CRAMER
REED SMITH SHAW & MCCLAY
Attorneys for Amici Curiae
United States Steel Corporation
Wheeling-Pittsburgh Steel Corp.

WILLIAM FOSTER
Senior Attorney General
United States Steel Corporation

FRANCIS ST. C. O'LEARY
General Counsel
Wheeling-Pittsburgh Steel Corporation

OF COUNSEL
March 12, 1973

APPENDIX "A"

Section 6 of the Rivers and Harbors Act of 1890 provided:

"That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadsted, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, on or toward the building, repairing or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be

erected on the banks or sides of any port, harbor, basin, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement mose judicious and practicable and for the best interest of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is authorized to grant, in any place designated by him where navigation will not be obstructed thereby." 26 Stat. 426.

Section 6 of the Rivers and Harbors Act of 1894 provided:

"It shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than in the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy or injure in any manner whatever any seawall, bulkhead, jutty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks;

any and every such act is made a misdemeanor, and every person knowingly engaged in, or who shall knowingly aid, abet, authorize, or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to the conviction of the misdemeanor." 28 Stat. 363.

APPENDIX "B"

The following relevant debate took place at 26 Cong. Rec. 4358 53rd Cong. 2d Sess. (1894):

"*Mr. Ray*: I notice first that there are 50 pages of appropriations in this bill, and then there are about 25 or 30 pages of general legislation on this subject of navigation, etc., having nothing to... do with the improvements provided for in the bill. Now . . . I would like to know why . . . all this general legislation on these subjects is put in an appropriation bill appropriating money for the improvement of rivers and harbors?

"*Mr. Grosvenor* [A member of the Rivers and Harbors Committee and floor manager of the appropriations bill]: These items of general legislation have been suggested either by the Corps of Engineers, or by bills introduced on this floor and referred to the Committee on Rivers and Harbors. Incidental to the appropriation certain other considerations arise, and I may as well go directly to one case which will illustrate the whole question. The Chief of Engineers estimates a certain amount of money as being required for the dredging of New York harbor. In that same connection he informs the Committee that the existing legislation is inadequate to protect that harbor from the dumping, in violation of existing law, of the refuse matter of the City of New York into the navigable waters of the harbor. A very elaborate report was presented to the Committee on that subject, and it may be remembered that one Representative of the City of New York attempted to ingraft this

same legislation upon another appropriation bill, probably the sundry civil bill.

"The matter was pending and was incorporated in this bill, and it is germane . . . to the appropriation for the dredging of New York harbor; for surely it is as important to prevent the filling up of a harbor by artificial means as it is to dredge out of that harbor the materials which have been deposited there, whether by artificial or by natural causes.

"*Mr. Ray*: Then . . . the position of the Committee on Rivers and Harbors is that whatever legislation [touches] rivers and harbors . . . or anything that has water in it or about it, is to be put into the Appropriation Bill?

"*Mr. Grosvenor*: Not quite all of it . . . We limit ourselves in this way. *We have nothing to do with the light-houses or with any other matters that comes under the jurisdiction of the Committee on Commerce, but, so far as regards the protection of the channels of navigation, and protection of the shores from erosion and all matters of that kind, our jurisdiction covers them, and certainly it covers the questions of filling up of the navigable waters by deposits made in harbors or in rivers, and of the establishment of harbor lines, matters which relate strictly to the improvement and maintenance of navigation.*

"*Mr. Ray* [Referring to the "general legislation" of the Appropriation Bill]: You have provided in this bill or have provided heretofore enact-

ments which will prevent the *discharges or deposit of refuse matters in rivers and harbors where it will obstruct navigation?*

"*Mr. Grosvenors Yes, sir.*" (Emphasis added)

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NO. 72-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit.

BRIEF FOR AMICUS CURIAE JONES & LAUGHLIN STEEL CORPORATION

JUDD N. POFFINBERGER, JR.
J. RICHARD LAUVER
KIRKPATRICK, LOCKHART,
JOHNSON & HUTCHISON
Attorneys for Amicus Curiae

1500 Oliver Building
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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INTEREST OF AMICUS CURIAE

The interest of Jones & Laughlin Steel Corporation in this case derives from the pendency of criminal informations charging twenty one counts of violating Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 ("Act of 1899"), brought against it by the United States in an action similar to that brought against the respondent, Pennsylvania Industrial Chemical Corporation ("PICCO"). Jones & Laughlin Steel Corporation is engaged in the manufacture of steel and has plants in the City of Pittsburgh and at Aliquippa, Beaver County, Pennsylvania. Each of the twenty one counts is virtually identical and charges in essence that Jones & Laughlin Steel Corporation unlawfully discharged and deposited from its two manufacturing establishments during the period from July 10, 1970 to September 8, 1970 certain industrial wastes, including iron, aluminum and compounds containing these chemicals and chlorides, phosphates and sulphates, into navigable waters of the United States in violation of Section 13 of the Act of 1899. Jones & Laughlin Steel Corporation subsequently filed a Motion to Dismiss the twenty one counts contained in the Informations. The district court deferred disposition of the Motion to Dismiss until the final resolution of the PICCO case because of the similarity of the issues in the two cases. Jones & Laughlin was granted permission to file a brief as amicus curiae and to participate in the oral arguments by the Court of Appeals below. The Solicitor General and counsel for PICCO have granted Jones & Laughlin Steel Corporation their consent to file this brief as amicus curiae in support of the respondent.

SUMMARY OF ARGUMENT

This Court has never considered in the context of a criminal case whether Section 13 of the Rivers and Harbors Act of 1899 reaches industrial wastes flowing in a liquid state into the navigable waters of the United States. The Pennsylvania Industrial Chemical Corporation, respondent here, was convicted for discharging such industrial waste into the Monongahela River even though the discharge had no adverse effect on the navigability of the River. There are admittedly several decisions of lower federal courts which support the United States, but your Amicus hastens to add that these cases have misinterpreted the opinions of this Court relating to the discharge of industrial solids and oils.

The legislative history of the Act of 1899 does not support the expansive construction of the Act urged by the United States. Otherwise, the United States has most unjustly permitted the Act of 1899 to lay dormant for over seventy years without sufficient notice to PICCO or anyone else of its possible metamorphosis into an ecology statute. Further, this Court has never considered the relationship, if any, of the federal water quality legislation to the Act of 1899. This relationship must be crucial because the discharge of PICCO which gave rise to its accusation under Section 13 of the Act of 1899 at the same time, *mirabile dictu,* complied with the federal water quality criteria.

Section 13 of the Act of 1899, together with certain other sections relative to navigation, was saved from repeal by the federal water quality legislation commencing in 1948 because of the different purposes of the

two acts. The fact that Section 13 of the Act of 1899 was saved from repeal in 1948 demonstrates how long the United States refrained from seeking the attempted judicial rewriting of the Act of 1899.

The decision by the Court of Appeals that PICCO was denied a fair trial because of the lack of any permit program pertinent to Section 13 of the Act of 1899 was fundamentally sound. Without a permit program, the Act of 1899 works an unconscionable hardship on PICCO, whose discharges into the navigable waters then met the existing federal water standards. By the United States' own admission, only five permits assertedly, but not proved, for industrial discharges have been issued since 1899. The regulations in effect in and immediately after the discharges by PICCO explicitly stated that Section 13 permits would be issued only for navigational obstructions. Thus, in the summer of 1970, PICCO had no warning of its impending conviction, much less of such possibility. PICCO's conviction must offend all concepts of fair play in this land.

ARGUMENT

The Court of Appeals Correctly Held That the Discharge by PICCO of Industrial Waste Into Navigable Waters Which Did Not Interfere With Navigation Without a Permit Under Section 13 of the Rivers and Harbors Act of 1899 Did Not Constitute a Criminal Act.

This case basically involves the further effort of the United States to resurrect a navigational statute of the 19th century in the form of a present day ecology statute. Throughout its brief, the United States, while denying any feat of legerdemain for this remarkable metamorphosis, points with obvious pride to its remarkable successes in convincing the federal lower courts of the transformation of the Act of 1899. The United States justifies its use of the Act of 1899 as an ecology statute on the grounds that Congress in 1899 mandated, and early court of appeals decisions confirmed, such a result. It decries the decision of the Court of Appeals below as an attempt to rewrite legislation, when in actuality the Government itself has been engaged in a classic example of promoting judicial legislation under a guise of interpreting the Act of 1899.

Accordingly, your Amicus respectfully suggest that this Court examine the lower court decisions which claim to draw their authority from *United States v. Republic Steel Corp.*, 362 U.S. 482, and *United States v. Standard Oil Co.*, 384 U.S. 244. These decisions of the lower courts have so misconstrued and expanded the holdings of *Republic Steel* and *Standard Oil* that as a result they bear little, if any, resemblance to their purported authorities. This Court has never decided whether the Rivers and Harbors Act of 1899 prohibits the dis-

charge into navigable waters of industrial waste where the discharge does not affect or impede navigation adversely. Yet virtually every reported case involving the discharge of industrial waste presumes this issue is well settled. For example, in the memorandum decision of *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971), the district court, citing *Republic Steel* and *Standard Oil*, stated that:

> "It has long since been authoritatively settled that the Act prohibits *all* discharges of polluting matter (other than sewage) into navigable waters, regardless of its source or continuing nature and irrespective of its effect upon navigation." *Id.* at 688.

The cause of this fundamental error by the lower courts can be best described by a precept recorded by Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, wherein he stated at pages 399-400:

> "It is a maxim not to be disregarded, that general impressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The principle is clear; yet the lower courts, regardless of the facts in controversy and the nature of the discharge,

have routinely followed *Standard Oil* and *Republic Steel.*[1]

Two of the most significant cases cited by the United States in its brief are *La Merced,* 84 F.2d 444 (9th Cir. 1936) and *United States v. Ballard Oil Co.,* 195 F.2d 369 (2d Cir. 1952). Prior to these two cases, the case law under Section 13 was limited to factual situations which were within the orginal intendment of the Act of 1899. For example, in *United States v. Moran,* 113 F. 172 (S.D. N.Y. 1901), the defendant unlawfully dumped mud into a navigable stream, an obvious obstruction to navigation. Commencing with *La Merced,* however, the Government charged that the discharge of oil constituted refuse matter under Section 13. The same discharge, oil,

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1. Compare *United States v. Interlake Steel Corp.,* 297 F. Supp. 912 (N.D. Ill. 1969), with *United States v. Hercules, Inc.,* 335 F. Supp. 102 (D. Kan. 1971). The information in *Interlake* charged the defendant with discharging "iron particles and an oily substance into the Little Calumet River" in violation of Section 13 of the Act of 1899. The defendant did not challenge the Government's charge that iron particles and an oily substance constituted refuse matter within the meaning of Section 13. Since the discharge of iron particles and oil substances has a direct tendency to obstruct or impede navigation, *Interlake* is faithful to the holding in *Republic Steel.* On the other hand, the *Hercules* information alleged that the defendant discharged "a chemical compound NH_3 (ammonia)" into a tributary of a navigable river. Obviously, there was no allegation or proof that the discharge of ammonia affected navigation because it was discharged in a liquid state and would not settle out. Nevertheless, the court held that the discharge violated Section 13 under the rationale of *Standard Oil.* It is submitted that the *Hercules* court elevated *Standard Oil* to a higher plane than permitted by *Cohens v. Virginia.*

was also involved in *Ballard*. Although *La Merced* seems to stand for the proposition that Section 13 refuse matter need not obstruct or impede navigation, the *Ballard* decision subsequently put to rest the thought that oil was not a definite obstruction and impediment to navigation. Moreover, from any reasonable point of view, there is a vast factual and legal distinction between a discharge of raw gasoline or oil and the discharge by PICCO of industrial waste in a liquid state.[2]

As suggested above, therefore, the Government's attempt to convict PICCO of a crime must stand or fall in part on this Court's previous decisions in *Standard Oil* and *Republic Steel*. Understandably, the United States does not analyze these decisions as their precise holdings relate to the factual and legal issues presented in this case. It prefers to quote certain dicta that the Rivers and Harbors Act of 1899 does not require "a narrow, cramped reading", but that it should be interpreted "in light of the purpose to be served" (App. Brief, pp. 16-17). Notwithstanding these expansive statements, the undeniable fact remains that the Supreme Court of the United States has never ruled on a conviction under Section 13 of the Rivers and Harbors Act of 1899 based upon the discharge of industrial waste in a liquid state from a manufacturing establish-

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2. The United States failed to cite *Nicroli v. Den Norske Afrika-Og Australielinie*, 332 F.2d 651 (2d Cir. 1964), which refutes the broad construction of the Act of 1899 advanced by the Government. Moreover, another case cited by the United States, *Maier v. Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd*, 154 F.2d 1020 (3d Cir. 1946), supports the opposite view. The discharge there, grain residue, actually impeded navigation by filling in the channel.

ment into the navigable waters which does not adversely affect navigation.

Two matters must be readily apparent to this Court. First, the United States seeks to present this Court with a *fait accompli,* i.e., the substantial number of successful prosecutions in the recent years under the Act of 1899 compels the conclusion that its interpretation is correct (App. Brief. p. 18, fn. 16). Secondly, a number of original factual and legal issues are presented here which were not argued in *Standard Oil* and *Republic Steel,* and the social and legal climate relative to ecology and pollution has been vastly altered from that existing in 1960.

What, then, has this Court held with respect to the Rivers and Harbors Act of 1899. *United States v. Republic Steel Corp., supra,* was one for injunctive relief against three defendants wherein the defendants were charged with depositing industrial solids in the Calumet River, and the Government asked that they be enjoined from doing so and further be ordered to dredge the River to a certain depth under Sections 10 and 13 of the Rivers and Harbors Act of 1899.[3] The precise nature of the refuse matter there in controversy is extremely important here as a matter of precedential value. The refuse matter included iron oxide, metallic iron, slag, calcined limestone and graphite and was described by the lower court in 155 F. Supp. at page 450 as follows:

"33 . . . Samples taken by both the Corps of Engineers and the defendants showed that solids are

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3. Section 10 (33 U.S.C. §403) prohibits generally the creation of any unauthorized obstructions to the navigable capacity of the waters of the United States.

being deposited into the river from all sewers of the defendants. These solids are in excess of those being transported in the water at the time it is being pumped out of the river by the defendants. The solids being deposited in the Calumet River from the sewers of the defendants are being transported by suspension in the water and are not in solution or in a liquid state."

Thus the defendants were discharging solids into the River which directly obstructed navigation. The Court noted that the solids flocculated into larger units and were deposited on the River bottom. In fact, this shoaling reduced the depth of the River by as much as 9 feet (362 U.S. at 484).

On appeal, five members of this Court held that the deposit of the above-described industrial solids created an obstruction to the navigable capacity of the Calumet River in violation of Section 10, not Section 13, of the Act of 1899. The Court then held that the industrial discharges were not within the exception clause in Section 13 relating to refuse matter flowing from streets and sewers and passing therefrom in a liquid state. The Court *did not* decide that the industrial solids constituted refuse matter under Section 13 because the district court granted relief under Section 10 of the Act of 1899. Although it may be argued that a holding that the industrial solids were not within the streets and sewers exception to Section 13 is tantamount to a finding that the industrial solids constituted refuse matter, it cannot be called a definitive holding that all industrial wastes, whether solid or liquid, are refuse matter within the definition of Section 13.

Argument.

The limited scope of *Republic Steel's* holding with respect to Section 13 is readily discernible. A careful reading reveals three inherent limitations which substantially weakens its universal application in industrial waste cases. First, as pointed out above, the thrust of the Court's decision was to limit the streets and sewers exception rather than broadening the definition of refuse matter. Second, the industrial solids settled out in the river bed and directly obstructed navigation.[4] Third, the Court placed great importance on the administrative construction of the Act of 1899 by the Corps of Engineers as it related to the deposit of industrial solids in the Calumet River. The evidence showed that as early as 1909 the Corps of Engineers warned a steel company of the danger of accumulating industrial solids in the Calumet River. The District Engineer on at least 7 occasions required the solids to be removed from the River. An Act of Congress was even passed in 1935 in order to improve that River, and the accompanying House Report assumed that certain shoals would be removed by the steel company to the depth of 21 feet.[5] This history of shoaling in the Calumet River led the Court to conclude at page 490 that any doubts about the interpretation of the streets and sewers exception should be "resolved by a consistent administrative construction which refused to give immunity to industrial wastes resulting in the deposit of solids in the

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4. That the Court was chiefly concerned with the navigational impairment effect of the discharge is evident from the citation in footnote 6 at 362 U.S. 491 to HR Doc. No. 417, 69th Cong., 1st Sess., p. 9 dealing with shoaling.

5. HR Doc. No. 494, 72d Cong., 2d Sess.

very river in question".[6] Taken together, *Republic Steel* fails to support the ever expanding reach of Section 13 by the lower courts.

Six years later the Court decided *United States v. Standard Oil Co., supra.* The narrow issue there was defined by Mr. Justice Douglas as whether Section 13 refuse matter included the discharge of commercially valuable aviation gasoline in the navigable waters. The one count indictment charged that the defendant unlawfully discharged 100-octane aviation gasoline into the St. Johns River in violation of Section 13. The district court dismissed the indictment on the sole grounds that the Section 13 definition of refuse matter did not include commercially valuable oil. The district court distinguished between waste oil and commercially valuable gasoline, and held that the latter was not refuse matter. On this very narrow issue, the Court refused to accept this distinction and said at page 226 that:

> "Oil is oil and whether usable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation *and* a pollutant." (Emphasis added.)

Citing *Ballard, supra,* the Court continued at page 229:

> "The word 'refuse' in that setting . . . 'is satisfied by anything which had become waste, however useful it may earlier have been'. There is nothing more

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6. See *Federal Trade Comm'n v. Mandel Bros. Inc.,* 359 U.S. 385. By the same rule, the long settled practice by the Corps of Engineers in limiting permits under Section 13 to navigational obstructions should likewise be entitled to great weight in construing Section 13.

deserving of the label 'refuse' than oil spilled into a river."

"That seems to us to be the common sense of the matter."

The holding in *Standard Oil* is therefore limited to the discharge of commercially valuable aviation gasoline into a navigable river.

By ignoring the narrow factual situation presented to the Court, the United States seizes upon Mr. Justice Douglas' statement that the word "refuse" in Section 13 includes pollutants. Yet Mr. Justice Douglas also stated that oil "was both a menace to navigation and a pollutant", thereby indicating his concern for at least some navigational nexus. That this was Mr. Justice Douglas' intention is supported by his later statement that damage to waterways was "caused in part by obstacles which impeded navigation and in part by pollution" (384 U.S. 266).[7] Thus, in this context, the phase "and a pollutant" could easily be dropped from the holding without limiting its effect. In any event, this construction is equally as sound as that of the United States in the absence of any subsequent decisions by the Court on this point.

The nature of the industrial waste becomes exceedingly crucial when the legislative history of Section 13 is considered. The Amicus strongly disagrees with the statement in United States' brief (p. 15) that Section 13 was a codification and consolidation of earlier criminal laws designed to prohibit the discharge of matters that

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7. As in *Republic Steel,* the Court again stresses the importance of the administrative construction of Section 13 by the Corps of Engineers. 384 U.S. at 226.

cause pollution as well as to matters that obstruct navigation. To the contrary, it is respectfully submitted that any attempt to include matters that only "pollute" suggests the same kind of judicial legislation which the Government abhors in its brief.

Congress, on March 3, 1899, enacted the Rivers and Harbors Act as a codification of existing laws relating to navigable waters. Section 13 of that Act is set forth at pages 2 and 3 of United States' brief and has survived intact to this day. We agree with Mr. Justice Douglas, who stated in *Sandard Oil* that "the meaning we must give the term 'refuse' must reflect the present codification's statutory antecedents". On the other hand, the term must be limited and confined to the perimeters of the earlier statutes.

These statutory antecedents were born out of congressional reaction to the Supreme Court's decision in *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1. In *Williamette,* the Court held that there was no common law of the United States which prohibited obstructions in navigable waters. A bill (known as the Dolph Bill) was promptly introduced in Congress to nullify the *Willamette* decision. The Dolph Bill was subsequently attached (in conference) to the Rivers and Harbors Act of 1890, 26 Stat. 426. Section 6 of the Rivers and Harbors Act of 1890 provided as follows:

> "That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind what-

ever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadsted, harbor, haven, navigable river, or navigable waters of the United States *which shall tend to impede or obstruct navigation,* or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, *whereby navigation shall or may be impeded or obstructed*: Provided, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, basin, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, *or to prevent the depositing of any substance above mentioned* under a permit from the Secretary of War, which he is authorized

> to grant, in any place designated by him *where navigation will not be obstructed thereby.*" (Emphasis added.)

It is quite easy to spot the similarities between this Section and Section 13 of the Act of 1899, and it is immediately obvious that Section 6 of the Act of 1890 was aimed squarely at matters which "tend to impede or obstruct navigation". This should not be surprising inasmuch as *Willamette* involved the construction of a bridge across the Willamette River. In so limiting the Act of 1890, Congress was following proper legislative procedure in considering the occasion and necessity for the law and the mischief to be remedied.

Four years later, Congress enacted the Rivers and Harbors Appropriation Act of 1894, 28 Stat. 363. The Act of 1894 was directed at prohibiting deposits and obstructions in harbors and rivers for which Congress had appropriated money for improvements. Section 6 of this Act provided in pertinent part that:

> "It shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other *matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state,* in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than in the limits defined and permitted by the Secretary of War. . . ." (Emphasis added.)

An examination of the matter enumerated reveals an overriding concern for solid matter which would settle out and impede or obstruct navigation. It would appear

that the addition of the catchall phrase of "any other matter of any kind" was only included out of an abundance of caution. Certainly the list of prohibited matter was not included as an all-inclusive list of solid matter which could not be deposited in navigable waters. For instance, it omitted solids like coal and gravel which would likely be deposited in navigable waters. Acid, of course, due to its highly corrosive nature, offered a special hazard to the use of rivers and harbors by vessels. Notwithstanding the changes in textual content, there is nothing to indicate by an examination of the 1894 Act that it was intended to broaden the general navigational scope of the 1890 Act.

Indeed, this conclusion was shared in 1896 by the then Attorney General of the United States. Shortly after the 1894 Act was enacted, a question arose whether certain mining and ore-washing industries were permitted to discharge ore washings into the New River in Virginia. The Attorney General's opinion was then requested whether the Secretary of War was to consider only the interests of navigation as opposed to a consideration of the matter of the discharge "injuriously affecting the fish and the water of the stream and the scenery along the same". His answer under the 1894 Act was "no" because:

> "You should, therefore, be governed only by considerations affecting the navigation of the river, and if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must have presumed to have in mind in authorizing the frequent and large expenditures which have

been made in the improvement of the river." 21 Op. Att'y. Gen. 305, 308 (1896).

This Opinion is clear evidence of the intent of Congress in adopting the 1894 Act, especially since it was written contemporaneously therewith. Thus, if both the 1890 Act and the 1894 Act were navigation acts, and since both acts formed the Rivers and Harbors Act of 1899, it seems unduly harsh to argue that the Rivers and Harbors Act of 1899 was intended to impose criminal sanctions for discharging matter which does not impede or obstruct navigation.

One other act relating to the New York harbors should also be mentioned, although the codification of the Rivers and Harbors Act of 1899 did not include such act. Section 1 of the Act of June 29, 1888, 25 Stat. 209, 33 U.S.C. §441, prohibits the following acts:

> "The placing, discharging, or depositing by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor."

The 1888 Act can be most helpful in construing the Act of 1894 quoted above because it prohibited the deposit of refuse or any other matter of any kind, words identical to those found in the Act of 1894 (the immediate predecessor to the Rivers and Harbors Act of 1899). Therefore, it cannot be argued that "other matter of any

kind" includes all liquid matter of any kind without regard for its prospensity to affect navigation because the Act of 1888 was entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City".

If the Act of 1888 must be read in such a way as to give full meaning to this phrase, without extending it to encompass nonobstructing navigational impediments, the Rivers and Harbors Act of 1899 should also be so read and construed. Moreover, it has been adjudicated that the Act of 1888 did not apply to discharges which do not obstruct or injuriously affect navigation. In *Warner-Quinlan Co. v. United States,* 273 F. 503, 505 (3d Cir. 1921), it was held that:

> "The statute enumerates the specific materials which, in the opinion of Congress, would ordinarily be deposited into the waters and would obstruct and injure the harbor, but made sure that it should not be obstructed or injured because of the failure to mention all the materials that might possibly be placed or deposited in the prescribed limits, and so Congress added the words, 'or any other matter of any kind.' This means, applying the maxim of ejusdem generis, matter of the same general class as before mentioned. The materials mentioned, except acid, are mostly solids, and the injury which they would do the harbor would be to obstruct it."[8]

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8. The Court in *Standard Oil* also considered the rule of ejusdem generis when it held that the enumerated matter in Section 13 included those with a pre-discharge value such as oil, and therefore refused to limit Section 13 to matters without a pre-discharge value. This again points up that the Court's primary concern was oil and not other industrial wastes.

The Acts of 1890 and 1894 (and indirectly the Act of 1888) formed the antecedent statutes to the Rivers and Harbors Act. The Chairman of the Senate Commerce Committee, Senator Frye, confirmed on the floor that the Act of 1899 was only a compilation and revision of existing general laws relating to navigable waters and that it would have no new substantive effect. In response to a question by Senator Chandler whether the Act made any changes in the existing law, Senator Frye replied that "there are not ten words changed in the entire thirteen sections". 32 Cong. Rec. 2296. Try as one will to read the Rivers and Harbors Act of 1899 broadly, its legislative history does not support a construction which extends it to industrial wastes such as discharged by PICCO.

In summary, this Court has decided that the definition of refuse matter in Section 13 encompasses industrial solids and oil. Both industrial solids and oil have an adverse effect on the navigability of our waterways, and therefore the decisions in *Republic Steel* and *Standard Oil* are supported by a strict reading of Section 13 and the underlying Congressional intent. The case below does not fall within the holding of either case because the discharges by PICCO have absolutely no effect on navigation. The Court can affirm the decision of the Court of Appeals without over-ruling its earlier decisions, and thereby can bring to a halt the dangerous alteration of an old piece of criminal legislation in an effort to make it fit modern day conditions. There are now proper statutory remedies available to the Government to safeguard our environment. Such a decision would be entirely consistent with its prior holdings and with the legislative history of Section 13. The post

Standard Oil cases have misread the Court's expressed concern for our waterways as a judicial fiat to bring American industry to task for the accumulated neglect of many persons, including the United States Government itself, without regard to constitutional fair play and due process. These decisions, albeit well-intentioned, simply cannot be reconciled with a fair reading by any reasonable person in the summer of 1970 of *Standard Oil, Republic Steel,* Section 13 and its legislative history, or the existing Governmental Regulations and practices. These very thoughts were expressed by the Court in *Standard Oil* at page 225:

> "The crisis that we face in this respect [pollution] would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions."

Argument.

THE COURT OF APPEALS PROPERLY HELD THAT THE CONVICTION OF PICCO OFFENDED DUE PROCESS BECAUSE OF THE ABSENCE OF AN ESTABLISHED PERMIT PROGRAM UNDER SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 BY THE UNITED STATES.

In reversing the judgment of conviction of PICCO by the district court, the Court of Appeals below held that PICCO was convicted of a crime which did not exist, and that in any event the conviction violated due process. Even a cursory review of its opinion reveals the fact that the Court of Appeals was shocked, to say the least, by the Government's position. The Court of Appeals did not act unreasonably in reversing PICCO's conviction. In its opinion, it resolved all doubts concerning the navigational and streets and sewage exception issues in favor of the United States and against PICCO. Mindful of the Court's admonition in *Standard Oil* that Section 13 cannot be construed in a vacuum (384 U.S. at 225-26), the Court of Appeals could not ignore the recent events surrounding the rediscovery of Section 13 and the institution of a permit program. These events, coupled with the interplay of the Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. (1973 ed.) §§1251-1376, ("FWPCA") created a set of circumstances that the Court of Appeals concluded "may well have been unfair to the point that PICCO's conviction violated due process" (Def. App. A., p. 24a). Rather than stand Section 13 on its head, as the United States suggests, the Court of Appeals acted in the highest tradition of judicial integrity by upholding the concept of fair play in the administration of criminal statutes.

Argument.

The Court of Appeals was not the first court to be alarmed at the harshness of the Government's position vis-a-vis Section 13 of the Rivers and Harbors Act of 1899. In *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N. D. Ind. 1970), the court stated at page 358:

> "Defendant stresses the incongruity and unfairness of a regulatory scheme that provides for specific water quality standards, and yet permits the criminal prosecution of companies that spent millions of dollars in complying. The Court has considerable sympathy for defendant's position. The result *is* incongruous, and perhaps injust."

The district court in *United States v. Maplewood Poultry Co., supra,* likewise expressed sympathy with the plight of industry caused by the Government's use of Section 13 as water quality legislation.[9]

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9. In *United States v. Hercules, Inc.,* 335 F. Supp. 102 (D. Kan. 1971), the court ameliorated the gross injustice of a Section 13 conviction by dismissing nine of ten counts on the grounds that a continuing industrial discharge could not result in a separate count for each day of the discharge. Instead the court held at page 107 that the discharge was "precipitated by one impulse and with singleness of purpose". Although the district court's rationale was different from that of the Court of Appeals below, both courts shared a common adverse reaction to the Government's position. The district court found support in the Court's opinion in *United States v. Universal C.I.T. Corp.,* 344 U.S. 218, 222:

> "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

Argument.

The Court of Appeals was quick to see that PICCO's conviction under Section 13 did not make sense in light of existing water pollution statutes. It made even less sense when the non-existence of a permit program under Section 13 was considered, an issue that was not present in either *Standard Oil* or *Republic Steel.* The Court of Appeals therefore applied the traditional rules of due process and fair play to the relevant facts and laws as they existed in the summer of 1970 at the time of the discharges by PICCO.

The due process clause of the Fifth Amendment of the United States Constitution serves an important contemporary function in requiring that a statute convey a minimum warning of its impact and scope to men of reasonable intelligence so that one need not necessarily act at his own peril to know whether he is obeying the law or not obeying the law. See *Connally v. General Construction Co.,* 269 U.S. 385 and *Lanzetta v. New Jersey,* 306 U.S. 451. In part, this is an extension of the traditional canon that all penal statutes must be narrowly and strictly construed as eloquently expressed by Mr. Chief Justice Marshall in *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 at page 95:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative and not the judicial department. It is the leg-

islature, not the court, which is to define a crime, and ordain its punishment."[10]

The Rivers and Harbors Act of 1899 did not exist alone in the field of water legislation. Congress, mindful of the limited purpose of the Act of 1899 as contrasted with a program directed toward reducing stream pollution of all sorts, adopted in 1948 the FWPCA in an effort to meet the growing concern over the quality of our nation's waterways. This 1948 Act contained no express standards of water pollution, but it was the first act to recognize the absence of such standards in existing legislation. The 1948 Act preserved Section 13, together with several other sections, of the Rivers and Harbors Act of 1899 from any effect of impairment by the 1948 Act. In 1956, Congress amended the 1948 Act by adopting the Federal Water Pollution Control Act Amendments of 1956, 70 Stat. 498. The chief contribution of the 1956 Amendments was to place primary responsibility for the abatement of pollution of interstate or navigable waters on the several states. The 1948 Act was further amended by the Federal Water Pollution Control Act Amendments of 1961, 75 Stat. 204. These amendments were procedural in that they transferred the administration of the Act from the Surgeon General of the Public Health Service to the Secretary of Health, Education and Welfare.

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10. In his dissenting opinion in *Standard Oil,* Mr. Justice Harlan remarked that the rule of strict construction was not compelling in that case because the maximum penalty which could have been imposed upon Standard Oil Company was $2,500. In contrast, the maximum penalty which could be imposed on the Amicus is $52,500, hardly an insignificant sum.

In 1965, a rather comprehensive set of amendments entitled the Water Quality Act of 1965, 79 Stat. 903, was adopted. The intent of Congress in enacting the Water Quality Act of 1965 included the desire to "enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution". Congress provided for the establishment of definite water quality standards, and accepted, within limits, water quality criteria adopted by the states, as water quality standards under the FWPCA. Absent standards or inadequate standards in any state, the Secretary of the Department of the Interior was empowered to adopt standards appropriate to serve that state. The criteria of water quality to be met by standards to be adopted by any state included generally public health and welfare, enhancement of the quality of water and serving the overall purposes of the FWPCA. The Pennsylvania water quality standards for the Monongahela River were accepted by the Federal Government as the federal water quality standards under the FWPCA.[11] The Water Quality Act of 1965 further authorized the Attorney General to bring a suit on behalf of the United States to secure abatement of discharges which do not comply with the applicable water standards after due notice and hearing. The Water Quality Act of 1965 was enacted on October 2, 1965, and *Standard Oil* was argued on January 25, 1966. Thus, prior to this case, the conflict between the Act of 1899 and the FWPCA has never been fully briefed and argued before the Court.

Congress enacted another set of amendments to the FWPCA by the Water Quality Improvement Act of 1970,

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11. 18 C. F. R., Ch. V, Part 620.10.

84 Stat. 91, which dealt in large part with oil pollution. The 1970 Amendments, for the first time, declared an express legislative *policy* of the United States that there should be no discharge of oil into or upon the navigable waters of the United States.

When one views the FWPCA from its enactment in 1948 through the 1970 amendments, one realizes the comprehensive program of water pollution control which now exists. [12] Congress has now said that every person and corporation shall be responsible for the quality of the nation's water, subject to specific water quality standards and criteria adopted by the individual states. A serious problem, however, arises when any attempt is made to compromise the FWPCA program to the purposes of the Rivers and Harbors Act of 1899. The Court of Appeals stated the problem in this fashion:

> "There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and Section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." (Def. App. A, p. 10a).

The manifest conflict appeared in this case because at trial PICCO was prevented from proving that its discharges into the Monongahela River met the FWPCA

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12. The most recent amendments to the FWPCA, the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, confirm this argument. Although Section 4(a) of the 1972 Amendment saves pending actions under Section 13 from abatement, the Amendment will have a profound effect in improving the overall program of water quality.

standards as embodied in the water quality criteria adopted by the Commonwealth of Pennsylvania. Yet PICCO was convicted of violating the Act of 1899 when it discharged the same industrial waste. This conflict is real, not imaginary, and placed PICCO in an untenable position.

The United States denies that there is a conflict between the Acts for two reasons. First, it points to the saving clause in Section 24 of the FWPCA, as amended in 1970, 33 U.S.C. (1970 ed.) §1174, a wornout and wooden argument. It then refers to the permit provisions in Section 13.

Section 24 of the FWPCA as amended through 1970 saves the provisions of Sections 13, 14, 15, 16 and 17 of the Act of 1899. The United States suggests that the saving clause in Section 24 was added to the FWPCA as part of the Water Quality Act of 1965 because the FWPCA represents "only a partial response to the ecology problem". This argument ignores that the fact that the saving clause was part of the original enactment of the FWPCA in 1948. Furthermore, the United States concedes, as it must, that it first commenced a major enforcement program against discharges into navigable waters as are here involved in late 1969 and early 1970, more than 20 years after the saving clause was added. Although it is quite imaginative for the United States to argue the existence of extraordinary insight in Congress by enacting the Act of 1899, it is rather illogical for the United States to acknowledge that the will of Congress lay undiscovered for seventy years. The United States' argument suggests that some Rosetta Stone was found in 1969 which unraveled certain hiero-

glyphics written by Congress in 1899. Such an argument is patently absurd.

Congress had no thought in 1948 that Section 13 would be applied indiscriminately between navigation cases and ecological cases. It did not even have the benefit of the Court's interpretation of Section 13 in *Standard Oil* and *Republic Steel*. Apparently, it has never occurred to the United States that Congress intended that these sections of the Rivers and Harbors Act of 1899 should remain intact for purposes other than prohibiting discharges of matter which do not affect navigation. Congress obviously intended that Sections 13, 14 and 15 should stand unimpaired because they reached matters not within the purview of the FWPCA. The dumping of quantities of solid matter into navigable rivers is possibly a pollution problem, but more probably a navigational problem. Likewise, Section 14 is a navigational section as is Section 15, dealing with obstructions of navigable waters by vessels, floating timber and sunken vessels.[13]

The continued exception of the saving clause in the 1965 and 1970 Amendments to the FWPCA meant only that Congress did not intend to repeal a navigation statute that was never intended to cover the industrial discharges here involved, not that Congress intended that both statutes should regulate water quality. In fact, by the exception, Congress pointed out the difference between these two important statutes, one being a pollution statute and the other a navigation statute. There is no evidence whatsoever that Congress agreed

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13. Sections 16 and 17, 33 U.S.C. §§411-413 are enforcement provisions.

with the absurd interpretation of Section 13 by the lower courts.[14]

The Government's second argument relates to the permit provisions of Section 13. Although the Court of Appeals found that the permit provision of the Act of 1899 brought Section 13 of that Act into reconciliation with the FWPCA, it utterly rejected the Government's contention that the non-existence of a permit program in the summer of 1970 was immaterial to the offense charged. The permit provision of Section 13 authorizes the Chief of Engineers to issue permits for the deposit of refuse matter into navigable waters whenever in his judgment anchorage and navigation will not be injured. The United States contends that there is no conflict between the FWPCA and the Rivers and Harbors Act of 1899 because a person may be exonerated from any criminal charges under the Rivers and Harbors Act if he obtains a permit to discharge matter which is, subsequent to December, 1970, in compliance with the FWPCA.[15]

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14. The broad rewriting of the FWPCA in 1972 strongly confirms the argument that Congress did not agree that Section 13 was enacted to regulate water pollution.

15. At least one district court has construed the permit provision of Section 13. In *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970), the defendant was charged with discharging a red-brown sediment and an oily substance. The district court at page 357 offered this bit of circuitous reasoning:

> "Moreover, if only deposits forbidden by the Act were those which obstruct navigation, the final

We believe that the Court will take judicial notice of the absence of a permit program under Section 13 prior to December 25, 1970. On that date, President Nixon announced Executive Order No. 11574. 35 Fed. Register 19627. This Executive Order stated that a permit program would be initiated under Section 13 of the Act of 1899 and that such permits would be issued upon compliance with applicable Federal water quality standards. In April of 1971, the Corps of Engineers announced the adoption of regulations governing the is-

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> proviso [of Section 13] would make no sense. Under that proviso, the Secretary of the Army can permit otherwise illegal deposits if the Chief of Engineers finds that anchorage and navigation will not be impaired. If defendant's interpretation were correct, in any given case a permit would either be unnecessary — since non-obstructing deposits were never forbidden in the first place — or unobtainable — since the Secretary has no power to permit deposits that obstruct navigation. The final proviso makes sense only if the Act forbids deposits that pollute, as well as those which directly affect navigability."

This rationale of the court proves entirely too much and is internally inconsistent. True, Congress did not intend that the Act of 1899 should apply to matters which had no tendency to adversely affect navigation, and thus it was not necessary to obtain a permit from the Secretary for the discharge of industrial waste of that sort. That is not to say, however, that permits would be unobtainable in every case where the discharge had navigational impairment capability. The proviso simply states that the Chief of Engineers, in the exercise of his judgment, may permit certain discharges or deposits of matter which will not injure anchorage and navigation under the given circumstances, irrespective of the nature of the discharge.

suance of permits under Section 13 in compliance with Executive Order No. 11574. 36 Fed. Register 6564.[16]

Although the United States concedes in its brief (p. 30) that there was no established permit program under Section 13, it argues that an informal permit program existed. As proof of this informal program, the United States reveals, for the first time in this case, that five permits for the discharge, in its judgment, of so-called industrial waste have been issued by the Corps of Engineers since 1899, at least one of which was ac-

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16. At the time of the acts charged against PICCO in the summer of 1970, the Corps of Engineers, the agency charged with the administration and enforcement of the Rivers and Harbors Act of 1899, had published the following Regulation in the Code of Federal Regulations:

> "Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time it is considered preferable to act under Section 4 of the Rivers and Harbors Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). As a means of assisting the Chief Engineers in determining the effect on anchorage of vessels, the views of the U.S. Coast Guard will be solicited by coordination with the Commander of the Local Coast Guard District." 33 C.F.R. §209.200 (e) (2).

This administrative construction is entitled to great weight in interpreting Section 13. *United States v. Republic Steel Corp.*, 362 U.S. at 491.

tually a Section 10 permit (App. Brief, p. 28, fn. 30). It is ridiculous that this case, one of such magnitude and great consequence to others, should come to rest on such a slender reed. There is absolutely no foundation in law for a presumption that PICCO should have been aware in the summer of 1970 of an "informal permit program" which resulted in the issuance of one permit once every eighteen years. Nor is there any basis for charging PICCO with knowledge of the great flurry of press releases and memoranda announcing intentions that pollution and conservation factors would be considered in passing on Section 13 permits under a program which didn't exist. PICCO was charged with knowledge of those Corps of Engineers' regulations which were duly published in the Federal Register, and not with ill-defined ideas still gestating within the Corps. The published regulations clearly stated that permits would only be issued for navigational obstructions and impediments.

It is indisputably clear that a Section 13 permit program for the industrial discharges here involved was non-existent prior to December, 1970. It is an interesting event to see the United States charge of its citizens with an offense which remained unknown, much less described, until after the offense occurred. The least one can expect is that the Government will not intentionally confuse persons with conflicting rules. PICCO was convicted for discharges which occurred on August 7 and 19, 1970. On June 13, 1970, the Justice Department transmitted Guidelines for Litigation under the Refuse Act to United States Attorneys on June 13, 1970. Those Guidelines, as reported in BNA Environment Reporter on July 17, 1970 at page 288, are as follows:

"1. *The policy of the Department of Justice with respect to the enforcement of the Refuse Act* for purposes other than the protection of the navigable capacity of our national waters, *is not to attempt to use it as a pollution abatement statute in competition with the Federal Water Pollution Control Act* or with State pollution abatement procedures, *but* rather *to use it* to supplement that Act by bringing appropriate actions either to punish the occasional or recalcitrant pollutor, or *to abate continuing sources of pollution which for some reason or other have not been subjected to a proceeding conducted by the Federal Water Quality Administration* or by a State, or where in the opinion of the Federal Water Quality Administration the pollutor has failed to comply with obligations under such a procedure. *To this end, the instructions* in Section III below *encourage United States Attorneys to use the Refuse Act to punish or prevent significant discharges, which are either accidental or infrequent, but which are not of a continuing nature resulting from the ordinary operations of a manufacturing plant.* Discharges of this last type, of course, pose the greatest threat to the environment — but it is precisely this type of discharge that the Congress created the Federal Water Quality Administration to decrease or eliminate, and it is to the programs, policies, and procedures of that Agency that we shall defer with respect to the bringing of actions under the Refuse Act." (Emphasis added.)

Either the internal memoranda or understandings between the Secretaries of the Army and Interior and press releases were never communicated to the Justice

Department, or there was deep schism between various Departments of the United States. In any case, PICCO should not be criminally prosecuted because it was unknowingly in the middle.

Accordingly, the Court of Appeals correctly held that due process was lacking in the subsequent conviction of PICCO under the rules set forth in *Connally v. General Construction Co.*, 269 U.S. 385, 391, that a criminal statute:

> [M]ust be sufficiently explicit to inform those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Mr. Justice Holmes expressed the rule another way in *McBoyle v. United States*, 283 U.S. 25, 27:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make

the warning fair, so far as possible that the line should be clear."[17]

In conclusion, the statutory and regulatory scheme which faced PICCO in the summer of 1970 was not of sufficient constitutional clarity on which to base a criminal conviction under Section 13 of the Rivers and Harbors Act of 1899. To say that the Court's decisions in *Standard Oil* and *Republic Steel* put PICCO on notice that its industrial discharges constituted criminal conduct is to require of it more imagination than is required under any notion of fair play.

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17. This is especially true where the statute purportedly covers conduct that is not inherently evil. The United States admits in its brief at page 28 that for many years the "chemical and biological content of discharged effluents was generally not regarded as particularly significant".

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

JUDD N. POFFINBERGER, JR.
J. RICHARD LAUVER
Attorneys for Amicus Curiae
Jones & Laughlin Steel
Corporation

March, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. One of the issues to be resolved in this case is whether the second proviso in the Refuse Act of 1899, 33 U.S.C. 407, conditions enforcement of the general discharge prohibition in that statute on the establishment of a formal permit program. We have shown in our main brief (pp. 21–26) that neither the language nor the legislative history of the proviso suggests that the Secretary of the Army, in exercising his discretionary authority thereunder to permit certain discharges, is required to devise a regulatory scheme to make the broad anti-dumping provision operative. Respondent and *amici curiae* do not dispute this. Indeed, they have not even discussed the Act's second

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proviso in their briefs, but have argued instead, on the basis of other language in the Refuse Act, issues of statutory construction which are not now before the Court.

The principal contention of PICCO and the *amici* is that the language and legislative history of the Refuse Act indicate a congressional intent to prohibit only the discharge of refuse matter that would impede or injure navigation, without reaching deposits of industrial waste which have no significant adverse effect on navigation, such as the deposits involved in the present case. PICCO seeks, alternatively, to bring its discharges within the "sewage" exception to the statutory ban.

As we pointed out both in the certiorari petition (Pet. 5) and in our merits brief (Gov't Br. 5), these contentions were fully considered and rejected by the district court (Pet. App. 31a–32a) and by the court of appeals (Pet. App. 4a–6a). The remand order of the court below did not encompass either issue, but was for the sole purpose of giving "PICCO * * * the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses" or, alternatively, to prove "that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (Pet. App. 25a). Since no cross-petition for certiorari was filed by the respondent challenging the court of appeals' interpretation of the Refuse Act as covering PICCO's discharges of non-navigation-impeding industrial waste matter, the issues concerning the nature of the deposits involved here and their impact on navigation

are not before this Court. See *Brennan* v. *Arnheim and Neely, Inc.*, No. 71–1598, decided February 28, 1973, slip op. 4–5.[1]

Moreover, as shown in our main brief (pp. 15–17), the decisions of this Court in *United States* v. *Standard Oil Co.*, 384 U.S. 224, and in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, strongly support the court of appeals' ruling that the Act prohibits the particular type of discharge flowing from PICCO's pipes. *Standard Oil* involved an accidental discharge of aviation gasoline, which the parties stipulated "was dissipated into the river," and which the trial court found "was not such as to impede navigation."[2] This non-navigation-impeding discharge, the Court held (384 U.S. at 228–229), was refuse matter, the unauthorized deposit of which was proscribed by the first clause of Section 13, irrespective of its value. "The word 'refuse'," it stated (384 U.S. at 230), "includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse."

While respondent argues that its discharges into the Monongahela River of industrial waste matter cannot properly be labelled "pollutants" (but see pp. 5–6, *infra*), it does not—and obviously cannot—suggest that

[1] If respondent had filed a cross-petition for certiorari, seeking review of these issues by this Court, a decision in its favor would have eliminated any need for a trial on the separate issues that are the subject of the court of appeals' remand order.

[2] Both the stipulation and the district court's unreported opinion in *Standard Oil* are contained in the printed appendix filed in that case, No. 291, October Term 1965, at pp. 5–7, 8–11.

the deposits contained no "foreign substances" (see Gov't Br., pp. 4–5). It seeks, instead, to come within the "sewage" exception in Section 13. The court of appeals explicitly rejected this contention, holding that "[a]s a matter of law, * * * liquid industrial waste flowing through pipes into navigable water is not exempt from the proscriptions of the Act" (Pet. App. 6a). This Court reached the same conclusion in rejecting a similar argument in *Republic Steel, supra*, 362 U.S. at 490–491.[3]

2. PICCO also apparently takes the position that, because it had obtained a State permit in 1956 (PICCO Br., Exh. 6, pp. 10a–12a) for discharging industrial waste into the Monongahela River from this plant, it was not obliged to seek further permission from federal authorities (PICCO Br. 19, 26). No citation is offered in support of this proposition, and nothing in the Refuse Act confers any such exemption from its coverage. Moreover, Congress provided in the Water Quality Improvement Act of 1970, 33 U.S.C. (1970 ed.) 1171(b)(1), that the obtaining of a state permit is but a necessary first step to securing permission from the Secretary of the Army to discharge refuse matter under the 1899 Act.[4] As the district court pointed out below (Pet. App. 38a):

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[3] And see Gov't Br. 17, n. 14.

[4] Respondent and *amici* argue that the 1970 legislation calling upon states to establish water quality standards is irreconcilable with the Refuse Act ban on all unauthorized discharges of refuse matter into navigable waters. But, as the court of appeals pointed out (Pet. App. 8a), the two statutes "were designed to accomplish what may be viewed as the same end by different means." Congress made it abundantly clear that the later legislation was not to be construed as supplant-

> * * * the [Water Quality Improvement] Act requires, by § 1171(b)(1), that any applicant for a Federal permit to engage in an activity "which may result in any discharge into the navigable waters of the United States" shall provide the permitting authorities with certification from the state water pollution control agency that there is reasonable assurance that such discharge will not violate the applicable water quality standards.

It is, of course, irrelevant for present purposes whether PICCO could have gotten a federal permit for its discharges on the basis of its 1956 state permit, as it contends, since it never filed an application with the Secretary. We point out, however, that the state permit on which respondent relies was issued

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ing the 1899 Act (33 U.S.C. 1174), and, in addition, provided that the Secretary of the Army, in exercising his discretionary authority under the earlier statute, was not to ignore the water quality standards prescribed in the subsequent amendments to the Federal Water Pollution Control Act (33 U.S.C. 1171(b)(1)). Accordingly, as we have shown in our main brief (Gov't Br. 19–21, 26–27), the two statutes work together to prevent deposits into our Nation's navigable waters of foreign effluents having an impermissibly high waste content, that is, a waste content that would, under existing state and federal water standards, cause ecological injury or a danger to health or safety.

This objective will in the future be accomplished for the most part under a single statute, the recently enacted Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. That statute, however, by its terms has no effect on pending actions under the Refuse Act (Sec. 4 (a), 86 Stat. 896). And see Gov't Br. 13, n. 7. Moreover, the Refuse Act prohibition against non-navigation-impeding discharges continues to have vitality with respect to refuse matter deposited into navigable waters from other than a "point source" (*i.e.*, a pipe, ditch, or other conduit), which is the principal concern of the 1972 Amendments (Sec. 502(14), 86 Stat. 887).

more than ten years *before* Pennsylvania's federally-approved water quality standards were adopted on June 28, 1967 (40 C.F.R. 120.10). Thus, notwithstanding the 1956 permit, PICCO would need a later Pennsylvania permit certifying that its effluents met the 1967 state standards before the Secretary would even consider permitting the company to deposit its waste matter into the Monongahela River.[5] Even then, as the district court observed (Pet. App. 39a), other considerations "including the impact on fish and wildlife and the risk to health or safety," might have prompted the Secretary to withhold permission. That, however, is open to conjecture on this record, since the federal authorities were not given any opportunity to consider the matter.

3. Finally, with respect to respondent's due process argument, we have set forth in our main brief (pp. 34–39) why we believe that PICCO is in no position to claim it was affirmatively misled by the issuing authorities not to seek a discharge permit.

We there show that the Corps of Engineers changed its policy with respect to water pollution control in

[5] Respondent's offer of proof included no state permit indicating that the discharges from this plant satisfied the 1967 state standards (App. 166–169). Indeed, PICCO acknowledges (PICCO Br. 19, n. 9) that "to meet the new State standards, which would have become the new federal standards, by the end of 1974 * * *," it was at the time of trial "in the process of constructing a $300,000.00 new water treatment facility * * *."

1968, as manifested both in its new regulations[6] and in its public announcements.[7] PICCO's continued reliance on the pre-1968 policy of the Corps as grounds for not seeking permission from federal authorities in 1970 to discharge its industrial waste matter is thus to no avail.[8] Moreover, the company was specifically advised by the Corps in November 1970 that its discharges were "unlawful" and required "a permit issued by the Department of the Army under the Refuse Act, 33 U.S.C. 407" (App. 170). Yet it continued for at least another five months to deposit its waste matter into the Monongahela River without

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[6] While respondent and *amici* suggest that subsection 209.200(e)(2) of the new 1968 regulations raises some question of the Corps' concern for matters of pollution, we have already pointed out (Gov't Br. 35, n. 35) that that particular subsection is concerned only with designated dumping grounds within navigable waters, and does not purport to deal with Section 13 permits in the context of the type of discharges involved here.

[7] The announcement by the Corps of Engineers on July 30, 1970, is misprinted as it appears in the appendix to our main brief (p. 45), and we have therefore reproduced it in corrected form *infra*, at pp. 11–12.

[8] Respondent refers to a number of other federal permits it has obtained in past years (PICCO Br. 18–19). Those permits, however, essentially pertain to construction projects undertaken by the company, which did not involve discharges of any kind into the river. It is, therefore, not at all surprising, as respondent seems to suggest, that the Corps made no mention of a Section 13 permit in passing on the company's applications for the other federal permits.

applying for a federal permit;[9] the present criminal information was returned in April 1971 (see Gov't. Br. 38, n. 37).[10]

In these circumstances, there is no sound reason to excuse PICCO's failure to seek federal approval for depositing its industrial waste into the river on the ground that it had been "affirmatively misled" by the Corps of Engineers to believe that its activity was lawful (and see Gov't. Br. 38, n. 38).

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[9] It is undisputed that the Secretary, had he received a request from PICCO for permission to discharge, would have considered it, just as he considered similar requests from other companies made in November 1970 (Gov't. Br. 33).

[10] It is suggested by *amicus* Jones & Laughlin Steel Corporation (J&L Br. 32–33) that institution of the present action conflicts with the Department of Justice's guidelines advising United States Attorneys as to which criminal and civil suits they could institute under the Refuse Act "on their own authority." See *Justice Department Guidelines for Litigation Under the Refuse Act*, 1970 BNA Environment Reporter, 288–290. The case at bar, however, was not brought by the United States Attorney on his own authority. Rather, the action was authorized by the Department of Justice after consultation with, and independent investigation by, the Environmental Protection Agency. PICCO is one of several companies having an industrial plant on the banks of the Monongahela River. The discharges from its plant were among the heaviest on the river. Notwithstanding notification that its conduct was unlawful without a federal permit, PICCO continued to deposit its waste matter into the Monongahela; it did not seek permission to do so from federal authorities. The present action, therefore, was within the contemplation of the Department's policy in this area "to use [the Refuse Act] to supplement [the Water Pollution Control] Act by bringing appropriate actions * * * to punish the * * * recalcitrant pollutor * * *" (J&L Br. 33).

CONCLUSION

For the reasons stated herein and in our main brief, the judgment of the court of appeals should be reversed and the judgment of conviction should be reinstated.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

MARCH 1973.



APPENDIX

NEWS RELEASE

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For immediate release, July 30, 1970

CORPS OF ENGINEERS ANNOUNCES NEW PERMIT REQUIREMENTS

The Corps of Engineers today announced new permit requirements under the Refuse Act (33 U.S.C. 407) concerning all discharges into navigable waters. Permits will be required for all industrial discharges into navigable waters and their tributaries. New permits will be required where existing permits were granted without adequate consideration of the quality of the effluent. Permits will also be required for current discharges into navigable waters where no permits have been granted.

Applicants for new permits are now required to identify the character of the effluent and to furnish pertinent data such as chemical content, water temperature differentials, toxins, sewage, quantity of solids involved and the amount and frequency of discharge.

The Corps' revised requirements are in compliance with the Environmental Policy Act of 1969 which requires agencies to consider environmental impact in

the administration of public laws, and with the Water Quality Improvement Act of 1970 which requires applicants for Federal permits to file a certification from the appropriate State that the discharge "will not violate applicable water quality standards." Under the revised procedures, the effects of discharges on water quality will be considered in processing the permit.

While permits will be required for all future discharges into navigable waters and their tributaries, the Corps of Engineers will initially concentrate on major sources of industrial pollution not covered by existing permits. The Corps hopes that through widespread knowledge of its new permit requirements, including State certification, it will, along with other Federal, State, and local anti-pollution activities, encourage industries to accelerate their own anti-pollution efforts.

All actions under the Refuse Act having Water Quality implications are being closely coordinated with the Federal Water Quality Administration to insure unity in the Federal Water anti-pollution program.

U.S. GOVERNMENT PRINTING OFFICE: 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* PENNSYLVANIA INDUSTRIAL CHEMICAL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-624. Argued March 27, 1973—Decided May 14, 1973

After the District Court refused respondent's offers of proof of reliance on Army Corps of Engineers regulations limiting violations to those impeding navigation, respondent was convicted of violating § 13 of the Rivers and Harbors Act of 1899 by discharging industrial pollutants into a navigable river. The Court of Appeals reversed on the ground that § 13 did not apply absent formalized permit procedures or, alternatively, that respondent should have been allowed to prove that it was affirmatively misled by the Corps of Engineers regulations to believe that no permit was needed for these industrial pollutants. *Held:*

1. Section 13 prohibitions apply without regard to formalized permit procedures that it authorizes but does not mandate, and Congress did not intend to permit discharges specifically prohibited by § 13 when it enacted the 1965 and 1970 water quality acts directing States to create pollution prevention and abatement programs. Pp. 7–15.

2. Although § 13 bars all discharges of pollutants and not only those that constitute obstructions to navigation, the Corps of Engineers consistently limited its regulations to such obstructions and thus may have deprived respondent of fair warning as to what conduct the Government intended to make criminal. Pp. 15–20.

461 F. 2d 468, modified and remanded to District Court.

BRENNAN, J., delivered the opinon of the Court, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined; in Part II of which BURGER, C. J., and STEWART and POWELL, JJ., joined; and in Part I of which BLACKMUN and REHNQUIST, JJ., joined. BURGER, C. J., and STEWART and POWELL, JJ., filed a statement dissenting from Part I. BLACKMUN and REHNQUIST, JJ., filed a separate statement dissenting from the judgment and Part II.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-624

United States, Petitioner, v. Pennsylvania Industrial Chemical Corporation	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May 14, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review here the reversal by the Court of Appeals for the Third Circuit of respondent's conviction for violation of § 13 [1] of the Rivers and Harbors Act of 1899,

[1] Section 13, 33 U. S. C. § 407, provides:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed; *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage

33 U. S. C. § 401 *et seq.* Two questions are presented. The first is whether the Government may prosecute an alleged polluter under § 13 in the absence of the promulgation of a formal regulatory-permit program by the Secretary of the Army.[2] The second is whether, if the

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and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

Section 16 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 411, provides:

"Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorise, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to the conviction."

[2] A formal permit program under § 13 was established subsequent to the dates of the alleged violations involved in this case. See n. 9, *infra*. On October 18, 1972, Congress passed a comprehensive piece of legislation providing for national water quality standards and for a federal permit program relating to the discharge of pollutants into navigable waters. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. Section 402 of the 1972 Act prohibits further issuance of permits under § 13 of the Rivers and Harbors Act of 1899 and designates the Administrator of the Environmental Protection Agency as the exclusive authority to permit discharges of pollutants into navigable waters. In addition, the Act provides for a hiatus on new litigation under § 13 of the 1899 Act until December 31, 1974, or, if sooner, until final administrative action has been taken on permit applications submitted under the 1972 Act. The 1972 Act does not, however, affect pending actions under the 1899 Act. Federal Water Pollution Control Act Amendments of 1972 § 4 (a), 86 Stat. 896.

prosecution is maintainable despite the non-existence of a formal regulatory-permit program, this respondent was entitled to assert as a defense its alleged reliance on the Army Corps of Engineers' long-standing administrative construction of § 13 as limited to water deposits that impede or obstruct navigation.

On April 6, 1971, the United States filed a criminal information against the respondent Pennsylvania Industrial Chemical Corporation ("PICCO"), alleging that on four separate occasions in August 1970 the corporation had discharged industrial refuse matters[3] into the Monongahela River[4] in violation of § 13 of the 1899 Act. By its terms, § 13[5] prohibits the discharge or deposit into navigable waters of "any refuse matter of any kind or description whatsoever other than that flowing from streets and sewers and passing therefrom in a liquid state." The second proviso to § 13 provides, however, that "the Secretary of the Army . . . may permit the deposit"[6] of refuse matter deemed by the Army Corps

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[3] The refuse matters were identified as "iron, aluminum, and compounds containing these chemicals, and clorides, phosphates, sulfates and solids." App., at 3–4.

[4] The Monongahela River is a 128-mile-long, navigable waterway that flows through western Pennsylvania and northern West Virginia.

[5] Section 13 is sometimes referred to as the "Refuse Act of 1899," but that term is a post-1970 label not used by Congress, past or present. Moreover, some authors use the term to refer only to § 13, see, *e. g.*, Note, The Refuse Act of 1899: New Task for an Old Law, 22 Hast. L. J. 782 (1971), while others use it to refer to the entire Rivers and Harbors Act of 1899, see, *e. g.*, Rogers, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119 U. Pa. L. Rev. 761, 766 (1971).

[6] It has been suggested that since § 13 prohibits the "discharge or deposit" of refuse but authorizes the Secretary to permit only "the deposit" of refuse, it may be appropriate to distinguish between a

of Engineers not to be injurious to navigation, "provided application is made to [the Secretary] prior to depositing such material . . . ." [7] At trial, it was stipulated that PICCO operated a manufacturing plant on the bank of the Monongahela River, that PICCO-owned concrete and iron pipes discharged the refuse matter into the river, and that PICCO had not obtained a permit from the Secretary of the Army prior to the discharges in question. PICCO argued, however, that the discharges did not violate § 13 because (1) the liquid solution flowing from its pipes was "sewage" exempt from the statutory proscription; (2) the discharge did not constitute "refuse matter" within the meaning of § 13 because it was not matter that would "impede navigation"; and (3) the term "refuse" as used in § 13 must be defined in light of the water quality standards established pursuant to the Water Pollution Control Act of 1948 and its amendments.[8] In addition, PICCO sought to introduce evidence to show that its failure to obtain a § 13 permit was excusable in this instance because prior to December 1970 [9] the Army

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"discharge" and a "deposit" and hold that only a "deposit" of refuse may be permitted by the Secretary. Hearings before the Subcommittee on the Environment of the Senate Committee on Commerce, 92d Cong., 1st Sess. 31 (1971). However, we find no support for such a distinction in either the Act itself or its legislative history.

[7] The Secretary's authority to issue permits under § 13 terminated on October 18, 1972. See n. 2, *supra*.

[8] 62 Stat. 1155, as amended, Act of July 17, 1952, c. 927, 66 Stat. 755; Federal Water Pollution Control Act Amendments of 1956, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87–88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89–234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89–753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91–224, 84 Stat. 91.

[9] On December 23, 1970, the President announced the establishment of a formal § 13 permit program. Executive Order 11574, 35 Fed. Reg. 19,627 (Dec. 25, 1970). The Corps of Engineers followed on December 31, 1970, with proposed regulations. 35 Fed. Reg.

Corps of Engineers had not established a formal program for issuing permits under § 13, and moreover, because the Corps consistently construed § 13 as limited to those deposits that would impede or obstruct navigation thereby affirmatively misleading PICCO into believing that a § 13 permit was not required as a condition to discharges of matter involved in this case. The District Court rejected each of PICCO's arguments as to the scope and meaning of § 13, disallowed PICCO's offers of proof on the ground that they were not relevant to the issue of guilt under § 13, and instructed the jury accordingly. PICCO was convicted on all four counts and assessed the maximum fine of $2,500 on each count. 329 F. Supp. 1118 (WD Pa. 1971).

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court's holdings as to the application of § 13 to the matter discharged by PICCO into the river,[10] but rejected the District Court's conclusion that the § 13 prohibition was operative in the absence of formalized permit procedures. 461 F. 2d 468 (CA3 1972). The Court of Appeals reasoned that this interpretation was tantamount to reading § 13 to be an absolute prohibition against the deposit of any "foreign substance" into the navigable waters of the country and this would have had such a "drastic impact . . . on the nation's economy even in 1899," *id.*, at 473, that this interpretation could not reasonably be imputed to Congress. In-

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20,005 (Dec. 31, 1970). Final regulations implementing the President's program became effective April 7, 1931. 33 CFR § 209.131 (1972). That program, with certain changes, has now become part of the new permit program authorized by § 402 of the Federal Water Pollution Control Act Amendments of 1972. See n. 2, *supra*.

[10] This part of the Court of Appeals' decision is not before us for review. See *Brennan* v. *Arnheim and Neely, Inc.*, — U. S. —, — (1973); *NLRB* v. *International Van Lines*, 409 U. S. 48, 52 n. 4 (1972).

stead, the Court of Appeals concluded that Congress intended to condition enforcement of § 13 on the creation and operation of an administrative permit program. The Court of Appeals stated:

> "Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a non-existent regulatory program." *Id.*, at 475.

The Court of Appeals seems to have found support for this interpretation of § 13 in "Congress' subsequent enactments in the water quality field." *Id.*, at 473. The court stated that "[t]here would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and section 407 of the Rivers and Harbors Act [§ 13], if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." *Ibid.* As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13." *Ibid.* Accordingly, the Court of Appeals held that it was error for the District Court to have refused PICCO the opportunity to prove the nonexistence of a formal permit program at the time of the alleged offenses.

As an alternative ground for reversal, a majority of the Court of Appeals held that the District Court erred in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a § 13 permit for the discharge of industrial effluents such as those

involved in this case. If such facts were true, the Court of Appeals stated, it would be fundamentally unfair to allow PICCO's conviction to stand.

Thus, the Court of Appeals set aside PICCO's conviction and remanded the case to the District Court to give PICCO an opportunity to present the proffered proofs that had been disallowed by the District Court.

We granted the Government's petition for certiorari. 409 U. S. 1074 (1972). We agree with the Court of Appeals that the District Court's judgment of conviction must be reversed, but we cannot agree with the Court of Appeals' interpretation of § 13 as foreclosing prosecution in the absence of the existence of a formal regulatory-permit program.

I

Section 13 creates two separate offenses: the discharge or deposit of "any refuse matter" into navigable waters (with the streets and sewers exception); and the deposit of "material of any kind" on the bank of any navigable waterway or tributary where it might be washed into the water and thereby impede or obstruct navigation. *LaMerced*, 84 F. 2d 444, 445 (CA9 1936); *United States* v. *Consolidation Coal Co.*, 354 F. Supp. 173, 175 (ND W. Va. 1973). The second proviso to § 13 authorizes the Secretary of the Army to exempt certain water deposits from the prohibitions of § 13, "provided application is made to him prior to depositing such material." In exercising that authority the proviso requires the Secretary to rely on the judgment of the Chief of Engineers that anchorage and navigation will not be injured by such deposits. But even in a situation where the Chief of Engineers concedes that a certain deposit will not injure anchorage and navigation, the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—*i. e.*, the proviso pro-

vides that the Secretary "may permit" the deposit. The proviso further provides that permits issued by the Secretary are to prescribe limits and conditions, any violation of which is unlawful. It is crucial to our inquiry, however, that neither the proviso nor any provision of the statute requires that the Secretary prescribe general regulations or set criteria governing issuance of permits.

Thus, while nothing in § 13 precludes the establishment of a formal regulatory program by the Secretary, it is equally clear that nothing in the section *requires* the establishment of such a program as a condition to rendering § 13 operative. *United States* v. *Granite State Packing Co.*, 470 F. 2d 303, 304 (CA1 1972). In contrast, other provisions of the Rivers and Harbors Act of 1899,[11] do include a requirement for regulations. Consequently, we disagree with the Court of Appeals that § 13 itself precludes prosecution for violation of its provisions in the absence of a formal regulatory-permit program.

Similarly, there is nothing in the legislative history of § 13 that supports the conclusion of the Court of Appeals that such a requirement is to be read into the section. Section 13 is one section of a comprehensive law enacted in 1899 to codify pre-existing statutes designed to protect and preserve our Nation's navigable waterways. *United States* v. *Standard Oil Co.*, 384 U. S. 224, 226 (1966).

The history of the 1899 Act begins with this Court's decision in 1888 in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1. The Court there held that there was no federal common law prohibiting obstructions and nui-

[11] See § 11 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 404, which instructs the Secretary of the Army to establish harbor lines beyond which works may not be extended or deposits made "except under such regualtions as may be prescribed from time to time by him." See also § 4 of the Rivers and Harbors Act of 1905, 33 U. S. C. § 419, authorising regulations regarding the transportation and dumping of dredging material.

sances in navigable waters. In response to that decision, Congress passed a series of laws that were later reenacted as the Rivers and Harbors Act of 1899. Section 6 of the first such law, the Rivers and Harbors Act of 1890, provided in part:

> "That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadsted, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend or be construed to extend . . . to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is authorized to grant, in any place designated by him where navigation will not be obstructed thereby." 26 Stat. 426.

Four years later, Congress enacted the Rivers and Harbors Act of 1894. Section 6 of that Act provided in part:

> "It shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast,

> refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than in the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any seawall, bulkhead, jutty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks . . . ." 28 Stat. 363.[12]

In 1896, Congress commissioned the Secretary of War to compile the various acts protecting navigable waters and "to submit the same to Congress . . . together with such recommendation as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public interest."[13] The Secretary, in turn, delegated the task to the Chief of Engineers, and in February 1897, the Chief of Engineers delivered a draft proposal to the Secretary together with a cover letter that read in part:

> "I have the honor to submit herewith (1) a compilation [of the various existing laws protecting navigable waters] and (2) a draft of an act embody-

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[12] This section of the 1894 Act, as well as § 6 of the 1890 Act, were modeled after statutes passed in 1888 and 1886 pertaining only to New York Harbor. See *United States* v. *Standard Oil Co.*, 384 U. S. 224, 226–228 (1966).

[13] Act of June 3, 1896, c. 314, § 2, 29 Stat. 234.

ing such revision and enlargement of the aforesaid laws as the experience of this office has shown to be advantageous to the public interest." [14]

In his compilation, the Chief of Engineers combined the essentials of § 6 of the 1890 Act and of § 6 of the 1894 Act to form the present § 13 of the Rivers and Harbors Act of 1899. Congress enacted the compilation with virtually no debate that contains mention of the intended operative scope of § 13. It seems quite clear, however, that § 13 was intended to have no wider or narrower a scope than that of its two predecessor statutes. *United States* v. *Standard Oil Co., supra,* 384 U. S., at 227–228. It is true, of course, that the Chief of Engineers was authorized to recommend a "revision" or "enlargement" of the existing laws and that his cover letter accompanying the compilation referred to "a draft of an act embodying such revision and enlargement of the aforesaid laws." But the revision and enlargement was limited to "the existing law relating to the removal of wrecks," [15] and even on that subject the changes were minor. Indeed, Senator Frye, the Chairman of the Senate Rivers and Harbors Committee, stated in response to a question whether any great change was made in the existing law by the compilation: "Oh, no, there are not ten words changed in the entire thirteen sections. It is a compilation .... [with] [v]ery slight changes to remove ambiguities." [16]

Thus, the Court of Appeals' interpretation of § 13 has no support in the predecessor statutes of § 13. Plainly, neither of the predecessor statutes contemplated that application of their operative provisions would turn on the existence of a formal regulatory program. On the con-

[14] H. R. Doc. No. 293, 55th Cong., 2d Sess. (1897).
[15] *Ibid.* See 33 U. S. C. § 414.
[16] 32 Cong. Rec. 2297 (1899).

trary, § 6 of the 1890 Act provided only that its absolute ban on the discharge of enumerated substances could not be construed "to prevent" the Secretary of War from granting, in his discretion, a permit to deposit such material into navigable waters. And § 6 of the 1894 Act contained no direct permit authorization whatsoever.[17]

We turn then to the Court of Appeals' assertion that its conclusion is supported by later congressional enactments in the water quality field. In this regard, the Court of Appeals placed primary reliance[18] on the 1965

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[17] It is true that § 6 of the 1894 Act prohibited discharges and deposits only "elsewhere than in limits defined and permitted by the Secretary of War," but that language did not contemplate the establishment of a formal regulatory program by the Secretary. Section 6 of the 1890 Act granted the Secretary discretionary authority to permit nonimpending discharges and nothing in the 1894 Act purported to curtail that earlier grant of authority to the Secretary. Thus, the reference in the 1894 provision to "limits defined and permitted by the Secretary" refers merely to the Secretary's existing permit authority under the 1890 provision.

[18] Inferentially, the Court of Appeals also referred to § 4 of the Rivers and Harbors Act of 1905, 33 U. S. C. § 419. See 461 F. 2d, at 475 n. 7. But that provision, which was originally proposed as an amendment to § 13 of the 1899 Act and clearly contemplated the establishment of a formal regulatory program by the Secretary (although it does not require that such a program be established), provides no support for the Court of Appeals' interpretation of § 13. On the contrary, the existence of § 4 of the 1905 Act tends to confirm the conclusion that § 13 is not conditioned on the establishment of a formal regulatory program. For the legislative history of § 4 explains that it was deemed desirable to give the Secretary authority to promulgate general permissive dumping regulations as to some bodies of water (such as New York and Boston Harbors) because a large amount of illegal dumping was going on in these waters at night and it was "almost impossible to detect" the violators, thereby making it "impossible to secure convictions." 39 Cong. Rec. 3078 (1905). A formal regulatory program, in other words, was the lesser of two evils as to these bodies of water since there were insufficient facilities and personnel to effectively enforce the general prohibitions

and 1970 amendments to the Water Pollution Control Act of 1948—the Water Quality Act of 1965, 79 Stat. 903, and the Water Quality Improvement Act of 1970, 84 Stat. 91.[19] The Court of Appeals concluded that since the 1965 and 1970 Acts contemplated that discharges must meet minimum water quality standards, as set forth by state agencies, it would be "fundamentally inconsistent" to read § 13 as imposing a ban on all pollutant discharges. 461 F. 2d, at 473. We cannot agree. The Water Quality Acts were a congressional attempt to enlist state and local aid in a concentrated water pollution control and abatement program. The legislative directive of those statutes was that state and local officials, working in cooperation with federal officials, establish minimum water quality standards and create pollution prevention and abatement programs. Nothing in the statutes or their parent statute operated to permit discharges that would otherwise be prohibited by § 13, and in each case Congress specifically provided that the new statutes were not to be construed as "affecting or im-

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of § 13. The implication is clear, however, that had the persons responsible for the unauthorized dumping been discovered, prosecution for violation of § 13 would have been the appropriate remedy, even though then, as at the time of the present offenses, there existed no formal regulatory program under § 13.

No explanation was given by Congress for its ultimate decision to codify § 4 of the 1905 Act separately rather than as an amendment to § 13. Possibly, Congress hoped that such regulations would be issued sparingly so as not to eviscerate the broad antidumping prohibitions of § 13. In any event, the Secretary's discretionary regulatory-program authority under § 4 of the 1905 Act certainly cannot be read into § 13 as an operative requirement, and absent establishment of a regulatory program under § 4 of the 1905 Act as to a particular body of water, the prohibitions of § 13 remain in tact and completely enforceable.

[19] These statutes are to a large extent superseded by the 1972 amendments to the Water Pollution Control Act. See n. 2, *supra*.

pairing the provisions of [§ 13 of the Rivers and Harbors Act of 1899]." [20]

Indeed, the water quality legislation expressly complements the provisions of § 13 of the 1899 Act. Section 13, although authorizing the Secretary of the Army to permit certain water deposits, contains no criteria to be followed by the Secretary in issuing such permits. The water quality legislation, on the other hand, calls for the setting of minimum water quality standards, and once such standards are established, federal permit authority, such as that vested in the Secretary of the Army by the second proviso to § 13, is specifically limited to that extent—*i. e.*, a permit could not be granted by the Secretary unless the discharge material met the applicable standards. Water Quality Improvement Act of 1970, § 103, 84 Stat. 107. In essence, therefore, the Water Quality Acts placed a limitation on the Secretary's permit authority without undermining the general prohibitions of § 13. See *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686, 688 (Me. 1971); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 357 (ND Ind. 1970); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 916 (ND Ill. 1969).

We therefore find nothing fundamentally inconsistent between § 13 and the subsequent federal enactments in the water quality field. Section 13 declares in simple absolutes that have been characterized as "almost an insult to the sophisticated wastes of modern technology" [21] that "[i]t shall not be lawful" to discharge or deposit into

[20] See § 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113.

[21] Rogers, Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119 U. Pa. L. Rev. 761, 766 (1971).

navigable waters of the United States "any refuse matter of any kind or description whatever" except as permitted by the Secretary of the Army. In enacting subsequent legislation in the water quality field, Congress took special precaution to preserve the broad prohibitions of § 13 and in no way implied that those prohibitions were operative only under a formal regulatory-permit program. Similarly, nothing in the language or history of § 13 conditions enforcement of its prohibitions on the establishment of a formal regulatory-permit program and, as we have said in the past, "the history of this provision and of related legislation dealing with our free-flowing rivers 'forbids a narrow, cramped reading' of § 13." *United States* v. *Standard Oil Co., supra,* at 226; *United States* v. *Republic Steel Corp.,* 362 U. S. 482, 491 (1960).

II

We turn, therefore, to the Court of Appeals' alternative ground for reversing PICCO's conviction, namely, that in light of the long-standing, official administrative construction of § 13 as limited to those water deposits that tend to impede or obstruct navigation, PICCO may have been "affirmatively misled" into believing that its conduct was not criminal.[22] We agree with the Court of Apepals that PICCO should have been permitted to present relevant evidence to establish this defense.

At the outset, we observe that the issue here is not whether § 13 in fact applies to water deposits that have no tendency to affect navigation. For, although there was much dispute on this question in the past,[23] in

[22] It was conceded for purposes of this case that the refuse matter involved was not of a nature that would impede or obstruct navigation. 461 F. 2d, at 478. See also n. 3, *supra.*

[23] The seeming ambiguity of the language of § 13 and the sparce legislative history of that provision caused the lower courts to disagree over the years as to the proper scope of § 13. The second clause

United States v. *Standard Oil Co., supra*, we held that "the 'serious injury' to our watercourses . . sought to be remedied [by the 1899 Act] was caused in part by obstacles that impeded navigation and in part by pollution," and that the term "refuse" as used in § 13 "includes all foreign substances and pollutants . . . ." 384 U. S., at 228–229, 230.[24] See also *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 101 (1972). Since then, the lower courts have almost universally agreed, as did the courts below, that § 13 is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation. See, *e. g.*, *United States*

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of § 13, which prohibits the deposit of refuse on the "bank" of any navigable water or tributary where such refuse may be washed into the water, is expressly limited to deposits that shall or may impede or obstruct navigation. The first clause of § 13, however, which is set off from the second clause by a semicolon, contains no language of its own limiting its prohibition to navigation-impeding deposits. Similarly, in regard to the two predecessor statutes of § 13, § 6 of the 1890 Act was expressly limited to navigation-impeding deposits, but § 6 of the 1894 Act was not. And the legislative history of § 13 and its predecessor statutes is hardly conclusive on this issue. But see Note, Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899, 33 U. Pitt. L. Rev. 483 (1972).

See as construing § 13 to be applicable to all water deposits regardless of their tendency to obstruct or impede navigation, *LaMerced*, 84 F. 2d 444 (CA9 1936); *The President Coolidge*, 101 F. 2d 638 (CA9 1939); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (CA2 1952). See as construing § 13 to be applicable only to navigation-impeding deposits, *United States* v. *Crouch* (1922) (unreported, see *United States* v. *Standard Oil Co.*, 384 U. S. 224, 229 n. 5 (1966)); *Warner-Quinlan Co.* v. *United States*, 273 F. 503 (CA3 1921); *Nicroli* v. *Den Norske Afrika-Og Australielinie, etc.*, 332 F. 2d 651 (CA2 1964).

[24] *Standard Oil* involved an accidental discharge of aviation gasoline into navigable waters . The District Court had made the finding that the gasoline "was not such as to impede navigation." *United States* v. *Standard Oil Co.*, No. 62–291, appendix, at pp. 8–11.

v. *Granite State Packing Co.*, 343 F. Supp. 57, aff'd, 470 F. 2d 303 (CA1 1972); *United States* v. *Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (CA3 1967); *United States* v. *Consolidation Coal Co., supra*, 354 F. Supp. 173 (ND W. Va. 1973); *United States* v. *Genoa Co-op Creamery Co.*, 336 F. Supp. 539 (WD Wis. 1972); *United States* v. *Maplewood Poultry Co., supra*, 327 F. Supp. 686 (Me. 1971); *United States* v. *United States Steel Corp., supra*, 328 F. Supp. 354 (ND Ind. 1970); *United States* v. *Interlake Steel Corp., supra*, 297 F. Supp. 912 (ND Ill. 1969); contra, *Guthrie* v. *Alabama By-Products Co.*, 328 F. Supp. 1140 (ND Ala. 1971), aff'd, 456 F. 2d 1294 (CA5 1972).

Nevertheless, it is undisputed that prior to December 1970 the Army Corps of Engineers consistently construed § 13 as limited to water deposits that affected navigation. Thus, at the time of our decision in *Standard Oil*, the published regulation pertaining to § 13 read as follows:

> "§ 209.395. *Deposit of refuse.* Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407), prohibits the deposit in navigable waters generally of 'refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation." 33 CFR § 209.395 (1966).

In December 1968, the Corps of Engineers published a complete revision of the regulations pertaining to

navigable waters. The new regulations pertaining to §§ 9 and 10 of the Rivers and Harbors Act of 1899, dealing with construction and excavation in navigable waters, stated for the first time that the Corps would consider pollution and other conservation and environmental factors in passing on applications under those sections for permits to "work in navigable waters." 33 CFR § 209.120 (d) (1969). But notwithstanding this reference to environmental factors and in spite of our intervening decision in *Standard Oil*, the new regulation pertaining to § 13 of the 1899 Act continued to construe that provision as limited to water deposits that affected navigation:

> "(2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U. S. C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 CFR § 209.200 (e)(2) (1969).[25]

[25] Section 4 of the Rivers and Harbors Act of 1905 authorizes the Secretary of the Army to prescribe regulations to govern the transportation and dumping into navigable waters of dredgings, earth, garbage, and other refuse matter whenever in his judgment such regulations are required "in the interest of navigation." 33 U. S. C. § 419. Thus, the reference to that provision in the Corps' revised regulation did not signify a change in the Corps' construction of § 13.

At trial, PICCO offered to prove that, in reliance on the consistent, long-standing administrative construction of § 13, the deposits in question were made in good faith belief that they were permissible under law. PICCO does not contend, therefore, that it was ignorant of the law or that the statute is impermissibly vague, see *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), but rather that it was affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation. Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1959); *Cox* v. *Louisiana*, 379 U. S. 559 (1965).

Of course, there can be no question that PICCO had a right to look to the Corps of Engineers' regulations for guidance. The Corps is the responsible administrative agency under the 1899 Act, and "the rulings, interpretations, and opinions of the [responsible agency] . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which . . . litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944); *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 499 (1958). Moreover, although the regulations did not of themselves purport to create or define the statutory offense in question, see *United States* v. *Mersky*, 361 U. S. 431 (1960), it is certainly true that their designed purpose was to guide persons as to the meaning and requirements of the statute. Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution. See Newman, Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 Col. L. Rev.

374 (1953); Note, Applying Estoppel Principles in Criminal Cases, 78 Yale L. J. 1046 (1969).

The Government argues, however, that our pronouncement in *Standard Oil* precludes PICCO from asserting reliance on the Corps of Engineers' regulations and that, in any event, the revised regulation issued in 1968, when considered in light of other pertinent factors,[20] was not misleading to persons in PICCO's position. But we need not respond to the Government's arguments here, for the substance of those arguments pertains not to the issue of the availability of reliance as a defense, but rather to the issues whether there was in fact reliance and, if so, whether that reliance was reasonable under the circumstances—issues that must be decided in the first instance by the trial court. At this stage, it is sufficient that we hold that it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute.

Accordingly, the judgment of the Court of Appeals is modified to remand the case to the District Court for further proceedings consistent with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL dissent in part, because they agree with the Court of Appeals that the respondent on remand should also be given the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses.

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[20] The other factors that the Government argues must be taken into consideration are post-1968 regulations issued with respect to other sections of the 1899 Act and with respect to other acts, and certain Corps of Engineers press releases and periodic publications. Brief for Petitioner, at 35–38.

MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST agree with Part I, but believing that the Court's opinion and judgment in *United States* v. *Standard Oil Co.*, 384 U. S. 224 (1966), make absolutely clear the meaning and reach of § 13 with respect to PICCO's industrial discharge into the Monongahela River; that subsequent reliance upon any contrary administrative attitude on the part of the Corps of Engineers, express or by implication, is unwarranted; and that the District Court was correct in rejecting PICCO's offer of proof of reliance as irrelevant, would reverse the Court of Appeals with directions to reinstate the judgment of conviction.